

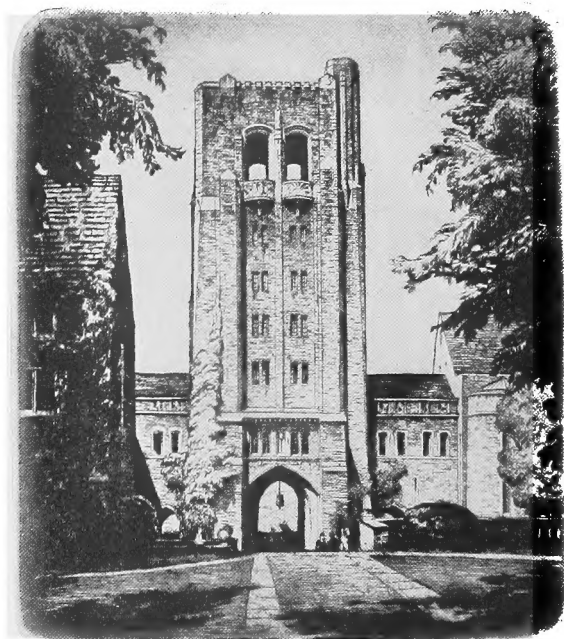
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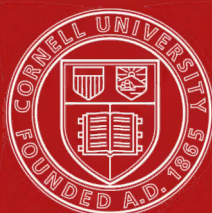
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A TREATISE
ON
SPECIAL SUBJECTS OF THE LAW
OF
REAL PROPERTY.

CONTAINING AN OUTLINE OF ALL REAL-PROPERTY LAW, AND MORE
ELABORATE TREATMENT OF THE SUBJECTS OF FIXTURES,
INCORPOREAL HEREDITAMENTS, TENURES AND ALODIAL
HOLDINGS, USES, TRUSTS, AND POWERS, QUALIFIED
ESTATES, MORTGAGES, FUTURE ESTATES AND
INTERESTS, PERPETUITIES, AND
ACCUMULATIONS.

BY
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1904.

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P R E F A C E.

No reasonable effort has been spared, in the preparation of this volume, to make it as complete as possible upon the subjects discussed. It is published at the present time, both to accommodate the law-school students to whom the author lectures, and to offer to students and practitioners generally, several years before the entire contemplated work can be done, any assistance that this discussion of the most technical and difficult portions of real-property law may be able to supply. The writer hopes so to add to it, within the next three or four years, as to finish a treatise, in two volumes, on all the topics ordinarily comprised within the law of real property. The plan and outline thus far pursued, and to be continuously followed, are fully explained in the fourth chapter of this book. And a reference to that chapter, and to the table of contents, will show that three leading subjects are yet to be discussed in detail, namely: estates considered with reference to their quantity, from the fee simple down to and including tenancies at sufferance; estates considered with reference to the number and connection of their owners,—estates joint, in common, by entirety, etc.,—and the entire subject of titles to real property.

The introductory portion of the present volume explains, with some particularity, the subject of fixtures, and the most important other kinds of property which have caused questions to arise as to whether they are realty or personalty; it also presents a complete outline of real-property law, and divides it into its four natural departments, to each of which a separate "Book" is to be devoted. "Book I.," which is here finished, deals with the kinds of real property,—lands, tenements, and hereditaments,—discusses fully the four American incorporeal hereditaments,—rents, franchises, easements and servitudes, and *profit à prendre*,—and adds a chapter on the

cognate topic of licenses. "Book II.," which is also complete, explains the tenures and alodial holdings of real property, and especially seeks to trace from their feudal sources, and so to elucidate, many of the leading principles of the land law of to-day. "Book III.," which treats of estates in real property and is to have five parts when finished, now presents three of those parts complete. The first of them, dealing with estates with reference to the courts that have recognized them, and dividing them accordingly into "legal" and "equitable," discusses the subjects of uses, trusts, and equities of redemption,—the three forms of so-called equitable estates. The second and third of those parts are yet to be written. The fourth is finished, and explains estates qualified,—on condition, on limitation, and on conditional limitation,—and the entire subject of mortgages. And the fifth part, which is also complete, deals with all the future estates and interests in realty,—reversions; remainders; contingent, springing, and shifting uses; powers; executory devises, and statutory future estates,—and adds a chapter, somewhat detailed, on the rules against perpetuities and accumulations.

Arising from experience with the difficulties encountered by students of the law of real property, three ideals have prompted and controlled the writing of these pages. They are the presentation of that law, *first*, in the perfect light of its own history; *second*, divested as far as possible of technicalities; and *third*, practically complete within the sphere which the discussion purports to include. The book itself must fall far short of such ideals. But a few words as to each of them may briefly explain what has been attempted.

The philosophy of English and American history is manifested in few concrete forms or systems, in which it is so thoroughly legible as in the common law of real property. There is a clear reason, in the development of the Anglo-Saxon race, for every important principle of that splendid, logical system. Therefore, the so-called modern law of real property can be appreciated only superficially, when studied alone. And an attempt to learn it, without taking note of the civil and juristic struggles through which it has been evolved, is as unfortunate for the student as would be a mere study of those struggles,

regardless of the resulting rules and theories that are controlling the practical men of to-day. The latest adjudications of the best courts, and the reasons for them, drawn from the profound, though sometimes technical, arguments of the ages, are what constitute the common law of realty for the thorough practitioner. An humble effort is made to present in this book both of those components of that law, and to insist that they shall not be separated in the labors of the learner.

Simplicity and terse clearness of illustration are primary *desiderata* in dealing with a subject which has been much affected by scholastic logic and methods of reasoning now discarded and obsolete. The doctrine of *scintilla juris*, for example, the principle of descent-cast, or the practice of fines and common recoveries, can not be wholly brushed aside and ignored; but they call for brief explanations in the forms of language and modes of thought of the present time. Without anticipating any knowledge yet to be acquired by the reader, it is earnestly sought in this work so to state these and the more important principles of the subject, and so to illustrate them, with recent authorities whenever possible, that an ordinarily careful reading can not fail to make them understood. The illustrations of each point or rule are not numerous, in most instances only one is given, and much care has been bestowed on all of them to make them as lucid as possible.

Nothing short of a voluminous digest can state all the modifications which recent English and American statutes have engrafted on the common law of real property. But that common law, as it is to-day, developed with the aid of the old landmarks of legislation into a system of rounded symmetry and logical beauty, together with the accompanying typical code of one important State, may be set forth in a work of convenient size for students and lawyers. Such a work is one of the ideals that have caused the writing of these pages. New York's codification has been selected as the local system, both because of its own importance, and because it has been a model for so much legislation of other States. The special statutes of that one State and their constructions are added, in separate full-measure notes, at the proper places throughout the book. And thus it is sought to make a practically complete treatise on New

York real-property law, yet without materially encumbering the text or other notes with anything that is purely local or special. It is hoped, moreover, that the text and general annotations, aiming as they do to explain the past and present common law of the land, may be found sufficiently clear and comprehensive to be of practical service to students and the profession, even where New York's code has had little or no influence.

In referring to authorities, care has been taken to cite more on doubtful points than on those that may be regarded as settled. Recent cases have been preferred to older ones, wherever they were otherwise equally valuable. The book is not to be advertised for its citation of *many* cases. It must rather embody, in this particular, the results of careful selection from the ponderous masses of adjudications. And reference to a standard text-book, on the special topic of the page, often closes a note containing citations of only two or three illustrative and decisive cases. Mr. Digby's scholarly treatise on the "History of the Law of Real Property" and the profound work of Professors Pollock and Maitland on the "History of English Law" are very often cited and quoted. The names of standard writers on the subject, such as Cruise, Williams, Leake, Washburn and Challis, adorn many pages. And, throughout the book, care has been taken to refer to special treatises, such as "Ewell on Fixtures," "Jones on Easements," "Bispham's Principles of Equity," "Perry on Trusts," "Thomas on Mortgages," "Fowler's Real-Property Law of the State of New York," "Gray's Rule against Perpetuities," "Chaplin on Suspension of the Power of Alienation," and many others, to which the author is gratefully indebted.

If what is here written prove in some degree a help to those who are endeavoring to master all or some portion of this subject, which is too often spoken of as dry and technical, or an aid in causing students to look on the study of real-property law as neither irksome nor unpleasant, at least one of its chief objects will have been accomplished.

A. G. R.

NEW YORK, February, 1904.

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THE LAW OF REAL PROPERTY.

INTRODUCTION AND OUTLINE.

CHAPTER I.

PROPERTY EXPLAINED AND CLASSIFIED.

§ 1. Plan of this treatise.	Goods and chattels — Lands, tenements, and hereditaments.
§ 2. Property defined.	
§ 3. Exclusive appropriation.	§ 7. Divisions of property — Real and personal.
§ 4. Divisions of property—Civil law.	§ 8. Leading distinctions between real property and personal property.
§ 5. Divisions of property — Early common law — Movable and immovable.	§ 9. Property which is sometimes real and sometimes personal.
§ 6. Divisions of property—	

§ 1. **Plan of this Treatise.** — The “everlasting hills” are not more ancient than many of the legal principles that regulate their ownership and use. The geology of jurisprudence discovers and explains those principles, fixed or operating in human institutions. As any conception of the earth is necessarily imperfect, which ignores the teachings of its *strata*, rocks, and fossils, so any discussion of law — and especially of the law of real property — which fails to deal with the splendid history and development of its subject, must be not only incomplete, but also to some extent erroneous. It is for this reason that much space is devoted in the following pages to the unfolding of modern elements of the law of realty from ancient practice, thoughts, and theories. In no other way can they be thoroughly understood. Therefore the simple plan of this treatise, after explaining its general subject-matter and dividing it into its four natural departments, — I. Lands, tene-

ments, and hereditaments; II. Holdings of these; III. Estates in them; and IV. Titles to them, — is to endeavor, as to each of these divisions and its subdivisions, first to make clear its meaning and nature as they appear from history and present usage, and then to unfold and explain the rules and principles of law that have grown up around it through the centuries.

§ 2. *Property defined.* — The idea of exclusiveness is the essential feature of all adequate definitions of property that have been formulated by jurists or philosophers. The statement, therefore, that property is something which one owns, to the *exclusion* of every other person, may be sufficient to convey a definite and practical conception of its meaning. But since the time when the word came into frequent use in the common law, which was probably not earlier than the beginning of the eighteenth century,¹ it has been employed by the best writers in many different senses. Among these various meanings there are three most frequent and prominent, which are especially the most important in connection with the subject-matter of this treatise.

(1) The term "property" is often used to denote the *object* or thing to which a right of ownership may attach. Such is its signification when it is said that a certain book, or horse, or farm is the property of a designated person; that one's property is situated in a specified county or city; or that all property has been divided into things movable and things immovable.² (2) Again, it is employed to indicate the *right* or *interest* which one has in a thing to the exclusion of all other individuals. Thus a man is said to have property in mills, or mines, or land; and when an article is bailed, the general property in it remains in the bailor, while the possession passes

¹ "As to *property*, though throughout the middle ages the French and Latin forms of the word occasionally occur, and the use of it is insured by the writ *de proprietate probanda*, we believe that until the last century it was far less frequent than would be supposed by those who have not looked for it in the statute book. Instead of property in the vaguer of the two senses which it now bears, men used *possessions* and *estate*. In a narrower sense *property* was used as an equivalent for best right (e. g. Co. Lit. 145 b; 'But there be two

kinde of properties; a general propertie, which every absolute owner hath; and a special propertie'), but in the Year Books it is by no means common." 2 Pollock & Maitland, *Hist. Eng. Law* (2d ed., 1899), p. 153.

² Standard Dict., "Property," 1.

This is the sense in which the word must be used in the discussion of *estates* in real property. The *property*, or object of ownership, is then thought of as one thing, and the interest or *estate* in it, as another. See this distinction more fully explained, § 292, *infra*.

to the bailee.¹ (3) The word is very frequently used to embrace anything and everything that may be owned by one person to the exclusion of others, — the external objects themselves and the rights and interests which may exist in connection with them. This last sense includes the other two, and is the broadest and loosest, though perhaps at the present time the most commonly employed, meaning of the term. When a man speaks of all his property, he is usually employing the word with this sweeping signification. He may thus include, for example, a house and lot which he owns absolutely and all his right and interest in the same, a life estate in an adjoining acre of land the residue of which is owned by some other person, a perpetual right to cross a neighbor's field, the furniture in his dwelling-house, the cattle upon his farm, shares of stock in a corporation, and a chose in action arising from contract or tort.²

The second of these three classes of definitions is logically and theoretically correct. There is, of course, an ownership, an exclusive appropriation (*proprietas*) of a thing, a dominion over it, as distinguished from the thing itself. It would have conduced to clearness and precision of thought if legislators, judges, and jurists had always agreed in confining their use of the word *property* to this etymologically and philosophically correct meaning, and in employing some other term or expression to denote the external objects to which such right, interest, ownership, or dominion might attach. But the history of the common law shows that they have been far from agreeing upon any such limitations.³ Therefore, in treating of one of its most important divisions, the term "property" must frequently be employed in the broadest and most general sense here stated; while in many instances, as the context will ordinarily make clear, it must be so restricted as to embrace only the objects or things that may be owned, as distinguished from the interests or estates which may exist in them. Care will be taken in this work to explain the sense in which the word is employed, in all instances in which ambiguity might otherwise result.

¹ Bouvier's Law Dict., "Property;" Standard Dict., "Property," 2; Co. Lit. 145 b; 2 Blackst. Com. pp. *452, *453.

² See Wms. R. P. (17th ed.) p. 4; 2 Blackst. Com. p. *2; Austin's Juris.

(4th ed.) 371, 804; N. Y. L. 1896, ch. 547, § 1.

³ "The word 'property' is used in so many senses as to be nearly useless for juristic purposes." Digby, Hist. Law R. P. (5th ed.) p. 302.

§ 3. **Exclusive Appropriation.**— But, whatever may be the signification of the word in the context in which it is found, it must always be borne in mind that nothing can be property which is not *exclusively* appropriated to individual ownership.¹ An undiscovered pearl at the bottom of the deep sea is not property, nor is there in it any property right in any sense of the word; and the same is true of any unknown island or other land outside of the geographical limits of governmental ownership.² The emancipation proclamation of 1863 took away all property in slaves, by forbidding exclusive appropriation of the labor of negroes.³ The right of a wife to take out insurance upon the life of her husband, since other persons may have the same right and their exercise of it does not affect hers, is not property, but at most a *status*.⁴ So, we have no property in the air or sunlight, as we ordinarily enjoy them, since they are not thus appropriated to our own exclusive use or control.⁵

§ 4. **Divisions of Property — Civil Law.** — Starting with the generic word *res*, as denoting objects of ownership, the Romans divided the things thereby indicated into *res mancipi* and *res nec mancipi*. While the former of these classes doubtless included at first all things which could be touched and handled, it was subsequently restricted to tangible articles in the sale of which certain formalities were prescribed; and the latter class then embraced all other tangible things and all those that were intangible and incorporeal. Articles that could be touched and handled were also divided into things *movable* and things *immovable*; and this distinction is still preserved in some civil-law jurisdictions.⁶

§ 5. **Divisions of Property — Early Common Law — Movable and Immovable.**— In the early and cruder stages of the common law, the division, which the civilians applied to tangible

¹ Definitions above quoted; Bracton, ch. xii. § 5.

² Com. Dig., *Biens*; Rutherford, Inst. 20; Nicholls v. Butcher, 18 Ves. 193; Sharp v. Sharp, 6 Bing. 630.

³ 2 Nicolay & Hay, *Lincoln*, p. 73; Morse's *Lincoln*, p. 130.

⁴ Holmes v. Gilman, 138 N. Y. 369, 379; Plessy v. Ferguson, 163 U. S. 537, 549.

⁵ But, of course, a right to enjoy these may become so appropriated as to

become valuable property. Such are the rights to light and air which the owner of land may have over streets, squares, or other open places. Story v. N. Y. El. R. Co., 90 N. Y. 122. See Sullivan v. Iron, Silver Mining Co., 143 U. S. 431; Pothier, des Choses; 18 Viner, Abr. 63.

⁶ Maine, Anc. L. ch. viii.; Mackenzie's Roman Law, 166-190; Hadley's Lectures, 86.

objects only, into things *movable* and things *immovable*, was adopted and extended roughly to all kinds of property.¹ The method of holding and enjoying the soil of the earth, houses, trees, and other things, which could not ordinarily be carried from place to place, gave emphasis and durability to this classification.² Soon after the conquest of England by William the Conqueror (probably about the twentieth year of his reign there), all absolute ownership of such things by private individuals was done away with by the introduction of the feudal system.³ The theory upon which that system was established and maintained was that all property of a permanent and immovable character belonged primarily and ultimately to the king; that he, as such absolute owner, had distributed it in large parcels amongst his chief followers, vassals, or tenants to *hold* of himself; that they, in turn, had in like manner sub-parcelled it out to their own vassals or tenants; that these latter had done the same as to the portions which they themselves received; and so on, down to those who took actual possession of the property, enjoyed it and made the avail or proceeds therefrom. Such holding one of another, under that system, is called *tenure*. He who thus holds is called a *vassal* or *tenant*; he of whom the property is held is the *lord*. The king, being the chief lord, above all others, is denominated *lord paramount*, and the others *mesne* lords; while he who is tenant or vassal only, and has no one holding of himself, but by his own labor enjoys the property and obtains the proceeds from it, is tenant *paravail*. Thus, each holder of the property between the king and the tenants paravail is the vassal or tenant of the one above himself, from whom he has received it and of whom he holds it, and the *mesne* lord of those to whom he in turn has parcelled it out. The purposes for which the system was invented and employed were chiefly military. As a condition to his right to hold his property, each vassal was compelled to serve in the wars with his lord, and also to render to him certain services and pecuniary returns. These duties and burdens became more and more oppressive with the growth and spread of the system,

¹ Glanvill, x. 6; Bracton, f. 61 b; Maine, Anc. L. ch. viii.

² "Glanvill and Bracton—at the suggestion, it may be, of foreign jurisprudence—can pass from movables to immovables and then back to movables

with an ease which their successors may envy." 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 2.

³ See fuller discussion of that system, Book II. ch. ii., *infra*.

until the legislative power intervened (in the twelfth year of Charles II.¹) and swept most of them away by statute.²

It is manifest at a glance that such a system, cumbersome and technical as it was, could not well be applied to articles that are temporary, movable, and easily destroyed. Cattle, carriages, household furniture, and the like are too perishable and insignificant to be subject to any feudal rights or duties. Absolute ownership by private individuals was accordingly recognized in such articles; and thus the distinction became very emphatic and important between those things which are *movable* and which one might own absolutely and those that are *immovable*, the only way of holding which by any one except the king was by *tenure*, under a superior lord and subject to all the burdens and incidents of feudal tenancy or vassalage.³

§ 6. Divisions of Property — Goods and Chattels — Lands, Tenements, and Hereditaments. — Property of a tangible and movable character readily came also to be designated as *goods* or *chattels*, or, by the combination of the two words, *goods and chattels*.⁴ Comparatively little is said of such articles by the law records and reports of feudal times.⁵ But upon immovable things the skill and subtlety of the legal profession were energetically bestowed; and statutes, reports, and learned treatises have preserved the results. In process of time such things were spoken of as *tenements*,⁶ because they were subject to tenure, i. e. were *holden* one of another; and as *hereditaments*,⁷ because on the death of the tenant or vassal they might pass to his heir, to be held by him of the lord in the same manner in which they had been held by the ancestor and subject to the same feudal rights and obligations. The word *lands*,⁸ also,

¹ 12 Car. II. ch. 24.

² 2 Blackst. Com. ch. iv.

³ Doubtless movable articles were much associated with things of a permanent nature, so as to pass with them; and in this manner they came under the operation of the feudal system. See 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 149.

⁴ These words are constantly used interchangeably, or together, to include all forms of property that we now call personalty. The etymological distinction between them is probably more commonly observed in England than in this country. See Sale of Goods Act,

56 & 57 Vict. ch. 71; also cases in English probate reports; Bouvier's Law Dict., "Goods and Chattels."

⁵ This is not so much because they were few and valueless, as because the procedure affecting them was ordinarily in the lower courts, and being simple and expeditious, was not brought to the attention of jurists as forcibly as that concerning realty. See 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 150 *et seq.*

⁶ Digby, Hist. Law R. P. (5th ed.) p. 72, n. 5; § 98, *infra*.

⁷ 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 181; § 99, *infra*.

⁸ See § 60, *infra*.

as denoting those tangible, substantial things which have permanency as to time and fixedness as to space, came readily into use; and so, during the vigorous sway of the feudal system, the property with which it dealt was constantly referred to as embracing *lands, tenements, and hereditaments*. This division of property into *goods and chattels* on the one hand, and *lands, tenements, and hereditaments* on the other, still retains its hold upon the common law; but it is not so generally employed, in this country at least, as the more familiar classification into *real property* and *personal property*, which is to be next considered.¹

§ 7. **Divisions of Property — Real and Personal.** — The statute 12 Car. II. ch. 24, which was regarded by Blackstone as a greater acquisition to the civil liberty of England than even *Magna Charta* itself, took away most of the burdensome incidents of feudal tenure; and, while it left the theory of the feudal system still operative there, it broke down the chief distinction between different kinds of property, to which distinction that system had given emphasis. Although in England he who has an acre of land still *holds* it theoretically of the king, yet for most practical purposes he may now own it as fully and absolutely as he may his horse or his watch.² After the enactment of that statute, therefore, property naturally became classified upon a new basis or principle. An obvious and logical division of actions at law for wrongfully taking or detaining property had existed for a long time. When the only remedy was an action against the person who had done the wrong, and the judgment recoverable was simply for pecuniary damages and not for the return of the specific thing abstracted, it was called a *personal* action; while, if it could result in a judgment for the return of the article taken or detained, — the recovery of the *real* thing, — it was denominated a *real* action.³ It was natural that, after the overshadowing influence of the feudal system had been removed, the subject-matter affected by such actions should be divided in the same way as the actions themselves, and that property should be classified as (1) *Real Property*, or such as can be recovered specifically when it has been wrongfully taken or detained from its owner; and (2) *Personal Property*, or that for the wrongful abstraction, or

¹ 2 Blackst. Com. ch. ii.

² Co. Lit. 65 a, 93 a; 3 Blackst. Com. p. *167 *et seq.*; Wms. R. P. (17th ed.) 7.

³ Co. Lit. 118 b, 285 a, 288 b; Bract. 101 b; 3 Blackst. Com. p. *117; Stephen on Pleading, ch. i.

detention of which the specific common-law action is for damages against the wrongdoer.¹ This classification of the kinds of property into real and personal, with its historic foundation upon the different forms of common-law actions, is the most complete and satisfactory and the one universally recognized at the present time. It must be confessed, however, that the abolition in most common-law jurisdictions of those ancient forms of actions,² together with many of the distinctions which rested upon them, the establishment and use of new kinds of remedies and methods of procedure, the immense increase in the bulk of personalty in very modern times, the invention and production of various new forms of property of both classes and the multitude of novel uses and purposes to which things have been applied have made it difficult, in many instances, to determine whether given articles are real property or personalty. Some of the leading distinctions between them, in this respect, may be summarized as follows:—

§ 8. **Leading Distinctions between Real Property and Personal Property.**—(1) From an historical standpoint, as above shown, real property is such as, when wrongfully taken or retained from its owner, could have been recovered by a common-law *real* action; personal property is that for the wrongful abstraction or detention of which the specific common-law action was one for damages against the *person* of the wrongdoer.³ (2) Generally speaking, real property is fixed and immovable as to space and permanent as to time; personal property is temporary and perishable as to time and movable as to space.⁴ This is simply a general distinction, which in many cases is wholly inapplicable. For example, a door key, though carried around in one's pocket and liable to be lost or destroyed at any time, may be real property;⁵ while a house, though very heavy and difficult to move, may, under some circumstances (as when it is built by a tenant upon leased premises for purposes of trade or manufacture), be taken away from the land as personal property.⁶ (3) Real property may descend to the *heirs* of an owner thereof, who dies

¹ Co. Lit. 118 b; Bract. 101, 102; Wms. R. P. (17th ed.) p. 23; Digby, Hist. Law R. P., Appendix, § 1; 4 Law Quart. Rev. 394.

² See 3 & 4 Wm. IV. ch. 27, § 36; Chase's Blackst. pp. 716-734; Goelet v. Asseler, 22 N. Y. 225, 228.

³ Ibid.; Digby, Hist. Law R. P. (5th ed.) p. 71, n. 2; Wms. R. P. (17th ed.) p. 23.

⁴ 2 Blackst. Com. p. *16; Digby, Hist. Law R. P. (5th ed.) p. 303.

⁵ See "Fixtures," § 10, *infra*.

⁶ See §§ 32, 46, *infra*.

intestate as to it;¹ personal property passes to the executors or administrators of its deceased owner, to be used so far as necessary for the payment of his debts, and the residue either to be disposed of according to the provisions of his will, or, if it be not disposed of by a will, to be divided amongst his *distributees*² as ascertained by common-law principles or the ruling statutes of distributions.³ (4) The ancient common law did not permit real property to be taken on execution for the payment of debts; but it did allow personal property to be so taken.⁴ This distinction has been materially modified by modern statutes, creditors being now generally able to reach their debtors' real property, or some interest therein, for the payment of their debts; but the prevailing rule requires the personalty to be exhausted before the real property can be taken.⁵ (a)

Many other distinguishing features might be mentioned. Thus, the law which affects real property is that of the place where it is located, that which governs personalty is usually the law of the place of its owner's domicile; a conveyance of real property is now uniformly required to be made by a writing, while personal property may generally be transferred by delivery and acceptance. The two classes of property are governed by different rules as to the levying and collecting of taxes upon them and the methods of making, filing, recording, and satisfying of mortgages and other liens and encumbrances. These distinctions and many others, the knowledge of which is

(a) Thus, it is required in New York that an execution "must, except in a case where special provision is otherwise made by law, substantially require the sheriff to satisfy the judgment out of the personal property of the judgment debtor; and, if sufficient personal property cannot be found, out of the real property belonging to him at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter." N. Y. Code Civ. Pro. § 1369; *Saunders v. Reilly*, 105 N. Y. 12, 21; *Dunham v. Reilly*, 110 N. Y. 366.

¹ By the canons and statutes of descent. N. Y. L. 1896, ch. 547, art. ix.; Stimson, Amer. Stat. L. §§ 3100-3169; Title by Descent, § 91, *infra*.

² This word is employed as the most convenient and accurate (though it is not generally used as much as might be) to describe those persons who are entitled by law to share in the personalty of an intestate decedent. It includes the "next of kin"—i. e. the

blood relatives who may so share—and a surviving husband or wife.

³ 22 & 23 Car. II. ch. 10; 29 Car. II. ch. 30; N. Y. Code Civ. Pro. §§ 2732-2734; Stimson, Amer. Stat. L. ch. iv.

⁴ 2 Blackst. Com. pp. *160, *161; 2 Woerner, Adm'n, p. 1093.

⁵ Digby, Hist. Law R. P. (5th ed.) pp. 281-284; 2 Woerner, Adm'n, p. 1093.

necessary to a clear apprehension of the law of real property, will be explained in the following pages.

§ 9. **Property which is sometimes Real and sometimes Personal.** — At any particular instant of time every piece of property in the world is either real or personal. There is no third or intermediate class. Yet some things that are personal to-day may be real to-morrow; and others that are now real in character may be personal a year hence. To articles which readily or frequently change in this manner the term "mixed property" has been occasionally applied.¹ It is not a desirable expression, however; and, when employed, must never be taken as intimating the existence of any distinct class or division. Illustrations of things, which because of their varying conditions may raise important questions regarding their nature as realty or personalty at any given time, are ice, crops, trees, buildings, etc., and fixtures. A brief discussion of such articles as these is important, in order to ascertain the exact limits of the subject-matter dealt with by the law of real property. Such discussion naturally divides itself into two parts; namely, (1) An investigation of that somewhat extensive class of articles called fixtures; and (2) An inquiry into the nature of such other things as may readily change from the one species of property to the other, but are not embraced by the term "fixtures."

¹ 2 Blackst. Com. p. *428; *Dudley v. Ward*, Ambler, 113.

CHAPTER II.

FIXTURES.

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§ 40. Conclusion, as to fixtures.

§ 10. **Fixtures—History and Definitions.**—Until times comparatively recent, the common law as we know it gave but scant attention to personal property. Doubtful questions as to the nature of an article were, before the time of Henry VI., con-

stantly solved by treating it as a part of what is now called realty. It was thus brought within the favored class, and under the operation of the well-known legal principles which had developed with the Anglo-Saxon race.¹ In support of this tendency, the maxim *quicquid plantatur solo, solo cedit* — whatever is affixed to the soil (or freehold) is a part of it and passes with it — became of much importance.² The result was that, whenever one who had possession of land attached personal articles to it, or used them as things accessory to its enjoyment, they became, in contemplation of law, a part of the land and a portion of the real property of its owner. Such things, being thus attached or *affixed* to the land, either actually, or constructively from the manner of their use in connection with it, were called *fixtures*. And the definition was accordingly framed, that fixtures are things in their inherent nature chattels, which have been so annexed to real property as to be deemed a part of it.³ This meaning still largely adheres to the word. Many judges and text-writers commonly employ it with such a signification.⁴

As personal property grew in amount and importance before the law,⁵ and the spread of commerce and business enterprise increased and diversified the purposes for which real property could be employed, numerous exceptions were en-

¹ 3 Reeves' Hist. Eng. L. 15, 369; 2 Blackst. Com. pp. *384, *385; 2 Kent's Com. p. *341; Minshall v. Lloyd, 2 M. & W. 450, 459; Elliott v. Bishop, 10 Exch. 496, 507, 508.

² Broom's Legal Maxims, pp. *401-431.

³ See definitions of this kind in Worcester's Dict.; Webster's Dict.; Ewell on Fixtures, p. 6; Hill on Fixtures, § 1; Minshall v. Lloyd, 2 M. & W. 450, 459; Story, J., in Van Ness v. Packard, 27 U. S. (2 Pet.) 137, 147. In the early treatises on the common law the term "fixtures" does not appear as a distinct heading. The subject is discussed, however, frequently under the topic "waste," and to some extent under that of "executors and administrators" in connection with the question as to what may be "assets" in their hands. See Brown on Fixtures, § 2; N. Y. Code Civ. Pro. § 2712, subd. 4.

⁴ See, for a few illustrations, Potter v. Cromwell, 40 N. Y. 287; McRea v. Cent. Nat. Bk., 66 N. Y. 489; Feder v. Van Winkle, 53 N. J. Eq. 370; Harmony v. Berger, 99 Pa. St. 320; Capen v. Peckham, 35 Conn. 88, 94; Thomas v. Davis, 76 Mo. 72; Capital City Ins. Co. v. Caldwell, 95 Ala. 77; Tyler on Fixtures, pp. 36, 37.

⁵ It would be incorrect to follow the writers of a century or more ago and to state that there was very little personal property during feudal times. 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 149 *et seq.* But it was the growth of this kind of property in importance before the law, especially before the higher courts whose records and reports we have, and in particular for the tenant for years when his right became fixed as an *estate*, that caused a relaxation of the ancient preference for calling such things realty.

grafted upon the maxim *quicquid plantatur solo, solo cedit*.¹ In cases in which the relation between the owner of the land and the person who places such things upon it is that of landlord and tenant, those exceptions have now become so important as practically to constitute the rule.² In most instances, the tenant for life or for a term of years may remove from the land, before he surrenders it back to the landlord, the personal chattels which he has annexed thereto or used in connection therewith.³ The existence of so many exceptions to the maxim has caused some modern writers to go to the other extreme in framing their definitions of fixtures. They accordingly define them as personal chattels annexed to or used in association with land and removable by the person who so annexed or uses them.⁴

Neither of the definitions above given accurately describes fixtures. The bricks in the wall of an ordinary building were at one time personalty; and they have been annexed to the land in such a manner as to form a part of it. They are included by the first of these definitions. Yet they are not fixtures, and are never treated as such by the law. On the other hand, a tenant's tables, chairs, carpets, and other articles of household furniture, used by him in connection with the land, and perhaps to some extent fastened to the dwelling-house, are personal chattels which he may take away. They are fully within the second definition; and yet they are never treated by the law as fixtures. It follows that there are some chattels which, although annexed to or used in association with realty, may *unquestionably* be removed by their owners. They are not fixtures, but simply personal property. Other things of a personal character, when annexed to the land, become *unquestionably* a part of the real property. These likewise are not fixtures; and this is because they can make *no question* arise as to whose property they are. There are yet other articles of a personal character which have been annexed to real property, or are used in association with or as accessory to it, and they are of such a nature, and such use or enjoyment is had of them in connection with the land, that it can not be determined until certain tests are applied and certain *questions* answered whether they are real or personal. They are so

¹ Broom's Legal Maxims, pp. * 417-431.

² See §§ 32-34, *infra*.

³ *Ibid*.

⁴ Ferard's Fixtures, p. 11; Bouvier's

Law Dict.; Burrill's Law Dict.; Ewell on Fixtures, p. 4 *et seq.*; *Hallen v. Runder*, 1 C. M. & R. 266; *Pickerell v. Carson*, 8 Iowa, 544; *Prescott v. Wells*, 3 Nev. 82.

situated or used, moreover, that, as the property changes hands and different interests and rights therein succeed one another, the question as to their removability may arise again and again. Such things are fixtures. Hence the following definition, as framed by a careful writer, appears to be substantially accurate and complete; namely, fixtures are "things associated with or more or less incidental to the occupation of lands and houses or either thereof, and with regard to which the question most frequently arising is that of their removability by the person claiming to remove them."¹

It is conceived that such a definition as that last quoted is the only one that can give any logical or satisfactory idea of the term under discussion. It is its liability to raise a question between adverse claimants that marks as a fixture an article used in connection with real property. The question thus raised is to be answered, as above indicated, by the application of certain tests or *criteria*, which are deduced from the decisions and will be hereafter explained. By this application of the *criteria* some fixtures may be shown to be real and others personal; while an article, which remains all the time in the same position and condition, may turn out to be real property as between some claimants, and, as between others, personalty. While connected or associated with the houses or lands, it remains all the time a fixture. The *criteria* are applied to determine whether for the purpose in hand the fixture is realty or personalty.²

The word "fixtures" will be used in this treatise with the meaning indicated by the last definition above stated. The reader must constantly remember, however, that courts and text-writers frequently employ it in some one of the other senses above explained. It perhaps most commonly denotes simply those articles which have been so annexed to or used in association with realty as to become a part thereof. In the reading of any statute, text-book, or judicial opinion, which makes use of the word, the context is to be carefully examined to ascertain its meaning as there employed.

¹ Brown's Law of Fixtures (4th ed.), pp. 1-3. When a fixture is thus understood—taken at the point at which it may readily cause disputes—the expressions "real fixture" and "personal fixture" become intelligible. Remaining all the time in the same position, it may, by virtue of different contracts

and changes in the circumstances and relations of the parties, be realty to-day between A and B, and personalty to-morrow between C and D. See 32 Cent. Law Jour. 202.

² See the excellent discussion in Brown on Fixtures (4th ed.), p. 1 *et seq.*

§ 11. **Fixtures — Criteria for determining whether Realty or Personalty.** — So long as one and the same person remains the absolute and unrestricted owner of land and the things placed upon it, little thought is often given to the question whether such things are real or personal in character. But when the rights of other persons begin to attach to the property, as by the death intestate of its owner, or by his devising, selling, leasing, mortgaging, or otherwise encumbering or disposing of the land, the question as to what shall pass or be retained as part of the realty frequently becomes very material. Back of that question, as applied to any specific article, is the inquiry, what was the nature of that article while it was there upon the land before the question of ownership was mooted? And this last inquiry naturally suggests the further question, *what is the probable or reasonably presumable intent with which it was affixed to or used in connection with the land?* Do the circumstances of its annexation and use indicate that it was meant to remain personalty or to become a part of the realty? This is the primary and most important matter for investigation, and that to which the other *criteria* are largely subsidiary. One of the other tests is the *nature of the annexation*. This involves also an examination into the effects which the removal of the article in question would have upon the realty. And the third chief inquiry is *concerning the parties between whom the question of ownership arises*, — their relations to each other and to any other person who may have affixed the article, the part, if any, which each took in its annexation, and their respective interests in the land to which it is annexed or with which it is associated. These three *criteria* will be discussed in the order in which they have been stated.

1. *Intent as a Criterion.*

§ 12. **Reasonably Presumable Intent.** — Assuming that a personal chattel has been attached actually or constructively to realty, or used in association therewith so as to cause a question to arise as to its character, the most important inquiry is as to the probable or reasonably presumable intention with which it was so affixed or used.¹ Intention alone

¹ For a few of the many authorities which properly lay great stress upon this criterion, see *D'Eyncourt v. Greg-*

ory, L. R. 3 Eq. 382; *Hobson v. Gorringe* (1897), 1 Ch. 192; *Wiggins Ferry Co. v. O. & M. R. Co.*, 142 U. S.

can not change an article from personalty into realty. There must be also some annexation of the thing to the land, or some use or enjoyment of it in association with the land. Thus, a large stone, brought into a door-yard and intended to be used in the future for a stoop, was held to be personalty before it had been actually so used ;¹ and the rolls purchased for a rolling-mill, paid for and brought into it but never adjusted to it nor used with it, do not become a part of the realty, although they are brought there for the purpose of being at some future time fastened to the mill and used in connection therewith.² It is equally true that a mere unexpressed intention to treat a fixture as personalty will not, as a rule, change it from realty into a chattel. A vendor of a house and lot, for example, will not be allowed, before the deed passes, to remove valuable fixtures, simply because, after making the contract of sale, he declares that it was his secret intention to remove them.³ The law can not take cognizance of such undisclosed thoughts of him who fastens an article to the land ; but it can and does regard the *reasonably presumable* intent, to be gathered from all the facts and circumstances of the case.⁴

§ 13. **How Intent may be shown — Directly expressed.** — It frequently happens, of course, that such reasonably presumable intent is the same as the actual purpose with which the chattel was annexed, and that the direct testimony of him who affixed or used it is controlling as to its character.⁵ In

396, 415 ; *Potter v. Cromwell*, 40 N. Y. 287 ; *Voorhees v. McGinnis*, 48 N. Y. 278 ; *Wick v. Bredin*, 189 Pa. St. 83 ; *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632 ; *Hopewell Mills v. Taunton Sav. Bk.*, 150 Mass. 519 ; *Erdman v. Moore*, 58 N. J. L. 445 ; *Sword v. Low*, 122 Ill. 487 ; *Cunningham v. Cureton*, 96 Ga. 489 ; *Overman v. Sasser*, 10 Lawyers' Rep. Ann. 723, note ; *Tyler on Fixtures*, ch. vii. ; *Ewell on Fixtures*, ch. i. § iv. ; 13 Amer. & Eng. Ency. of L. (2d ed.) p. 597.

¹ *Woodman v. Pease*, 17 N. H. 282 ; *Cook v. Whiting*, 16 Ill. 480 ; *Ripley v. Page*, 12 Vt. 353.

² *Johnson v. Mehaffey*, 43 Pa. St. 308 ; *Cook v. Whiting*, 16 Ill. 480 ; *Ex parte Astbury*, L. R. 4 Ch. App. 630 ; *Mills v. Rundlett*, 23 N. H. 271 ; *Johnson v. Hunt*, 11 Wend. (N.Y.) 135 ; *Peck*

v. Batchelder, 40 Vt. 233 ; *Tripp v. Armitage*, 4 M. & W. 687.

³ *Snedeker v. Waring*, 12 N. Y. 170 ; *Rogers v. Brokaw*, 25 N. J. Eq. 496 ; *Catasauqua Nat. Bk. v. North*, 160 Pa. St. 303 ; *Crum v. Hill*, 40 Iowa, 506 ; *Thomas v. Davis*, 76 Mo. 72 ; *Tate v. Blackburne*, 48 Miss. 1.

⁴ The question is a mixed one of law and fact, and, when a jury is sitting, is to be submitted to it under proper instructions from the court. *Turner v. Wentworth*, 119 Mass. 459 ; *Southbridge Sav. Bk. v. Mason*, 147 Mass. 500 ; *Scobell v. Block*, 82 Hun (N. Y.), 223 ; *Harrisburg Electric Light Co. v. Goodman*, 129 Pa. St. 206.

⁵ *Erdman v. Moore*, 58 N. J. L. 445 ; *Sheldon v. Edwards*, 35 N. Y. 279 ; *Copp v. Swift*, 26 S. W. Rep. 438 (Tex. Civ. App.) ; *Tyler on Fixtures*, p. 115.

one case, a church society had torn down the edifice in which it had formerly worshipped, and removed the bell and its framework. The latter were placed at the front of a lot on which the society was building a new structure. An execution against the church society having been put into the hands of the sheriff, that officer attempted to levy upon the bell, thus located, as personal property. The church society having proved that its intention was to place the bell in the new belfry when completed, it was held that the sheriff's attempted levy was a nullity. The intention to put it back upon the land of the church and into the new building for use there, being clearly shown, caused the bell thus located to remain realty.¹ So, where the owner of a farm had taken down a fence and piled the rails in a heap, intending to build with them another fence upon the same farm, it was held that they remained a part of his real property.² And where rails were cut from the timber upon a farm and placed along the line of an intended fence upon the *same* premises, it was decided that they were thus made a part of the realty.³ If the church society had intended to sell or otherwise to dispose of the bell instead of putting it into its new edifice, or if the rails in either of the two cases last cited had been placed in piles for the purpose of being taken to market and sold, the result in each case would have been different and the fixtures involved would have been personalty. Accordingly, where the owner

¹ Congre. Soc. of Dubuque v. Fleming, 11 Iowa, 533; Weston v. Weston, 102 Mass. 514, 518, 519; Hadman v. Ringwood, Cro. Eliz. 145; Ewell on Fixtures, p. 354.

² Goodrich v. Jones, 2 Hill (N. Y.), 142; Aldine Mfg. Co. v. Barnard, 84 Mich. 632; Harris v. Scovel, 85 Mich. 32.

³ Conklin v. Parsons, 1 Chandler (Wis.), 240. In Cook v. Whiting, 16 Ill. 480, the owner of a farm hauled upon it hewed timber, to be placed in a granary, and posts to be built into a fence. Both of these came from a tract of land other than the farm upon which they were designed to be thus used. Before using either of them for the purpose indicated, he sold the farm, nothing being said in the contract as to whether or not the posts and timber should pass to the vendee. It was held

that they did not pass under the deed, but remained the personal property of the vendor. The distinction between this case and Conklin v. Parsons (*supra*) grows out of the facts that in the latter case the trees were cut *from the same land upon which they were to be used as rails in building the fence*, while in the former they were cut *from other land than that upon which they were to be used*. The cutting of them and moving of them to another part of the *same land*, with intent to use them there as parts of a fence, did not change their nature from realty to personalty. But when they were cut upon one tract and moved unto *another* they were thus made personalty, and must remain so until they were actually annexed to or used in association with the land upon which they were thus brought.

of a tract of land had split out a stone and slightly removed it from its original connection with the ledge, intending to carry it from the farm and use it in preparing a tomb on another lot, it was held to have become personal property, and so was not passed by his deed of the land.¹ In all of these cases the location and treatment of the things in question were consistent with an intent to regard them either as real property or as personalty, and therefore direct evidence of the *actual* intent of their owners was controlling. The same result follows when the person who makes the annexation affirmatively declares his mind to other persons interested in the property; and they either expressly consent, or act upon his statements, or make no objection against his acting accordingly.² So, if an owner of land place on it a fixture that can be removed without injury to the freehold, and plainly notify those who subsequently become his heirs and personal representatives that he wishes it to remain either personalty or realty, direct proof of such expressed wish will ordinarily settle any question that may arise between them as to its ownership.³

§ 14. **Intent shown by Contract.** — In other instances, such direct evidence of what was actually intended goes for naught, because an investigation of all the facts and circumstances of the case causes the court reasonably to presume to the contrary. Especially does this result frequently flow from contracts made between persons interested in fixtures and those who attach them to the land. Thus, if the vendee of a chattel agree with the vendor that it shall remain personalty and the title to it shall not pass until it is paid for, no amount of annexation of it to realty by the purchaser, and no strength of intention on his part that it shall become his real property, can change its nature as between the parties to such contract.⁴

¹ Noble v. Sylvester, 42 Vt. 146.

² Lancaster v. Eve, 94 Eng. C. L. R. 715, 726; Duffers v. Bangs, 122 N. Y. 423; Potter v. Cromwell, 40 N. Y. 287; Eaves v. Estes, 10 Kan. 314; Thomas v. Inglis, 7 Ont. Rep. 588; State Nat. Bk. v. Smith, 15 Wash. 160; Tyler on Fixtures, pp. 127, 128.

³ Hill v. Sewald, 53 Pa. St. 271, 273, 274; and see Lawton v. Salmon, 1 H. Bl. 259; Cunningham v. Cureton, 96 Ga. 489; Wicks v. Bredin, 189 Pa. St.

83; Pfuger v. Carmichael, 54 N. Y. App. Div. 153; Tyler on Fixtures, p. 691.

⁴ Taft v. Stetsin, 117 Mass. 471; Smith v. Benson, 1 Hill (N. Y.), 176; Andrews v. Day Button Co., 132 N. Y. 348; Ewell on Fixtures, p. 66 *et seq.* This is simply a clear instance of intent, as plainly evinced by contract express or implied. It has been said in some cases that here it is confusing to speak of any test as to fixtures being ne-

When the owner of a fixture gives a chattel mortgage upon it, or agrees to sell it as personal property, it must remain a chattel, as between him and the mortgagee or prospective vendee, until the mortgage is discharged or the contract satisfied.¹ Such articles are often so fastened to a building as to become realty as to third persons who are not parties or privies to the contract; but the agreements properly made definitely settle the question of intent and the nature of the fixture, as between those by whom they are made.² Among themselves and their privies the fixture must have the nature and character assigned to it by the parties to the contract; and, in cases of doubtful construction, the practical interpretation of the contract by them will be of primary importance.³ The agreement, which thus becomes decisive of the question of intent, need not be expressed, but may be implied from the nature, purposes, and circumstances of the transaction.⁴ Where, for example, land and houses were leased, with an option in the lessee to purchase the same at a price agreed upon, and certain fixtures firmly annexed to one of the houses were designated as intended to go to the lessee in case he purchased the premises, it was held that other fixtures in the buildings were excluded by implication and were not passed by the deed which the lessee subsequently obtained.⁵

§ 15. **Estoppel to deny Intent — Fraud — Public Policy.** — The owner of land may be estopped to assert an intention to

cessary; but the rights of the parties should be simply controlled by their agreement. See *Hobson v. Gorringer* (1897), 1 Ch. 182; *Andrews v. Day Button Co.*, 132 N. Y. 348, 354.

¹ *Tift v. Horton*, 53 N. Y. 377, 380; *Sisson v. Hibbard*, 75 N. Y. 545; *Tibbets v. Horne*, 65 N. H. 242; *Burrill v. S. N. W. Lumber Co.*, 65 Mich. 571.

² *Potter v. Cromwell*, 40 N. Y. 287; *Ford v. Cobb*, 20 N. Y. 344; *Campbell v. Roddy*, 44 N. J. Eq. 244; *Warner v. Kenning*, 25 Minn. 173; *San Antonio Brewing Assn. v. Ice Co.*, 81 Tex. 99. Of course, after the fixture is firmly annexed and would otherwise be realty, the agreement must be in writing, to comply with the requirements of the statute of frauds.

³ *Matter of Eureka Mowing Co.*, 86 Hun (N. Y.), 309; *Pfluger v. Carmichael*, 54 N. Y. App. Div. 153; *Woolsey*

v. Funke, 121 N. Y. 87, 92; *Sheldon v. Edwards*, 35 N. Y. 279; *Andrews v. Day Button Co.*, 132 N. Y. 348.

⁴ *Madigan v. McCarthy*, 108 Mass. 376; *Pope v. Skinkle*, 45 N. J. L. 39; *Mayo v. Newhoff*, 47 N. J. Eq. 31; 48 N. J. Eq. 619; *Charlotte Furnace Co. v. Stouffer*, 127 Pa. St. 336; *Cayuga R. Co. v. Niles*, 13 Hun (N. Y.), 170.

⁵ "If there be many things of the same class or kind, the expression of one or more of them in a conveyance implies the exclusion of all not expressed, although the law would have implied all if none had been enumerated. (2 Pars. on Cont. [8th ed.] 516; *Hare v. Horton*, 5 B. & Ad. 715.)" *Matter of Eureka Mower Co.*, 86 Hun (N. Y.), 309, 315; *Andrews v. Day Button Co.*, 132 N. Y. 348; *First Parish v. Jones*, 8 Cush. (Mass.) 184; *Pope v. Skinkle*, 45 N. J. L. 39.

remove fixtures. A vendor transfers by estoppel the articles which he has placed upon the land, or allowed to remain there, in such a manner as to induce the vendee to believe that they are realty and thus to conclude the purchase.¹ And a landlord who causes his tenant to make valuable annexations to the property by expressly or impliedly representing that they may be removed by the tenant, will not be heard to claim them as his own.² Under such circumstances the law fixes the reasonably presumable intent, without regard to what may have been the actual intent.³ So, to prevent fraud or the violation of right rules of public policy, articles will often be treated as one kind of property which were secretly intended when annexed to be regarded as the other.⁴

§ 16. **Other Tests are largely subsidiary to Question of Intent.**—In endeavoring to ascertain the reasonably presumable intention with which a fixture has been annexed to land or used in association with it, it frequently happens that no direct declaration of such intention can be found by the court, or if found it is not conclusive; also that no contract either express or implied relating to the character of the article as realty or personalty can be proved, and that no estoppel or principle of public policy operates against any of the adverse claimants. It then becomes necessary to apply the other tests or *criteria* above enumerated. One of these is an inquiry into the nature of the annexation, including an examination of the effects which the removal of the article in question would have upon the realty; and the other concerns itself with the parties between whom the question of ownership arises, their relations to each other and to any other person who may have affixed the article, the part, if any, which each took in its annexation and their respective interests in the land to which it is fastened or with which it is associated. While these

¹ *Snedeker v. Waring*, 12 N. Y. 170; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Tate v. Blackburne*, 48 Miss. 1; *Nat. Bk. v. North*, 160 Pa. St. 303.

² *Andrews v. Day Button Co.*, 132 N. Y. 348; *Wiggins Ferry Co. v. Ohio & M. R. R. Co.*, 142 U. S. 396; *Aldrich v. Husband*, 131 Mass. 480.

³ It has been said in some cases that the agreement or act, which is thus to determine the nature of an article, must be made or done before its annexation to the realty. See *Gibbs v. Estey*, 15

Gray (Mass.), 587. But, at least as to fixtures removable without injury to the realty, the great weight of authority is the other way. *Fuller v. Tabor*, 39 Me. 519, 522; *Morris v. French*, 106 Mass. 326; *Sowden v. Craig*, 26 Iowa, 156; *Mayo v. Newhoff*, 47 N. J. Eq. 31, 48 N. J. Eq. 619.

⁴ *Havens v. Germania Fire Ins. Co.*, 123 Mo. 403; *Sisson v. Hibbard*, 75 N. Y. 542. See *Nat. Bk. v. North*, 160 Pa. St. 303; *Cunningham v. Cureton*, 96 Ga. 489.

are often dealt with as matters for investigation separate and distinct from that already considered, yet they will ordinarily be found, in the last analysis, to have been used by the courts as subsidiary *criteria* to arrive at the reasonably presumable *intent* of the use or annexation. Their great importance for that purpose is directly or indirectly emphasized by nearly every decision upon the law of fixtures. It will conduce to clearness of thought to regard and treat them in that light.

2. *Annexation as a Criterion.*

§ 17. **Fixtures — Annexation, Use, or Enjoyment, as determining whether they are Realty or Personalty.** — *Constructive Annexation.* — The annexation of a fixture to realty may be either actual or constructive. It is actual when the article is physically attached to or united with the land; constructive, when no such real annexation exists, but the article is commonly used as appurtenant to the real property, appropriated and adapted to it and made accessory or reasonably necessary to its beneficial use and enjoyment.¹ The maxim *quicquid plantatur solo solo cedit* was formulated with primary reference to things firmly attached to the land. Actual, physical annexation was at first necessary to convert a chattel into real property.² But as soon as the courts began to give more heed to the matter of *intent*, they discovered many things which, although not actually united to the realty, were to be treated as a part of it, under the law of fixtures. It was accordingly held, as early as the fourteenth year of Henry VIII., that a millstone, which had been removed from the mill to be picked and was intended to be restored to its original position, was passed by a deed conveying the mill.³ Since that time the doctrine of constructive annexation of fixtures has been fully recognized.⁴ Other illustrations of things so annexed are

¹ *Wystow's Case*, 4 Man. & Ry. 280, note (g); *Liford's Case*, 11 Coke, 46 b, 50 b; *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116; *Williamson v. N. J. So. R. Co.*, 29 N. J. Eq. 311, 330. "In respect to all cases of constructive annexation, there exist both adaptation to the enjoyment of the land and localization in use as obvious elements of distinction from mere chattels personal." *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314, 323.

² *Broom's Legal Maxims*, p. 401 *et seq.*

³ *Wystow's Case*, 14 Hen. VIII. 25 b, which will be found translated in 4 Man. & Ry. 280, note (g); *Liford's Case*, 11 Coke, 46, 50 b.

⁴ See *Co. Lit.* 8 a; *Cro. Eliz.* 372; *Delaware, etc. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452; *Amos & Ferrard on Fixtures*, p. 168; *Ewell on Fixtures*, pp. 33-39.

door keys, detached door knobs, doors, windows, and window blinds, which are to be replaced upon the house, fences taken down but to be rebuilt upon the same land, and a church bell taken down and set loosely upon the premises while the church edifice is being repaired or rebuilt.¹ A common result of constructive annexation is the making of the article at once a fixture and a part of the real property.² And, in order to produce these results, the thing must be appropriated and specially adapted to the real property, used as accessory to its enjoyment, and reasonably necessary to give it completeness.³ Thus, a door key held for sale in the shop of a vendor of such articles is personal property; but when it has been bought by the owner of a house and fitted to the lock of one of the doors and is used for the purpose of locking and unlocking the same, it has become a part of the realty, though its owner may carry it around in his pocket.⁴ So a movable window-blind, by being fitted and adjusted to the window of a house, may become and remain a part of the realty, although at the time when the question as to its nature arises it is not actually used at the window to which it belongs.⁵ Such adaptation of chattels to real property and their use in connection with it point strongly to the conclusion that they have become a part thereof. This is because they indicate an *intention* on the part of their owner that they should be so treated. The method of using articles, however, and their fitness for and adaptability to the enjoyment of the land, will frequently not be conclusive as to such intention. The application of other *criteria*, or clear, direct evidence of intent may rebut the presumption which would otherwise arise from this test. Such, for instance, is frequently the result when the parties between whom the question arises are landlord and tenant, or their legal representatives.⁶

§ 18. **Actual Annexation — Effect of Removal.** — When the fixture is actually fastened or united to the real property, one

¹ Liford's Case, 11 Coke, 46, 50 b; Bishop v. Elliott, 11 Exch. 113; State v. Elliott, 11 N. H. 540; Hill v. Wentworth, 28 Vt. 428, 436; Dudley v. Hurst, 67 Md. 44; Goodrich v. Jones, 2 Hill (N. Y.), 142; Aldine Mfg. Co. v. Barnard, 84 Mich. 632; Congr. Soc. of Dubuque v. Fleming, 11 Iowa, 533.

² Ibid.

³ Ibid.; Hoyle v. Plattsburgh & M.

R. Co., 54 N. Y. 314, 323, quoted *supra*; Tyler on Fixtures, p. 58.

⁴ Bishop v. Elliott, 11 Exch. 113.

⁵ Liford's Case, 11 Coke, 46, 50 b; Walker v. Sherman, 20 Wend. (N. Y.) 636; Goddard v. Bolster, 6 Greenl. (Me.) 427; State v. Elliott, 11 N. H. 540.

⁶ See discussion of this relationship as affecting rights in fixtures, §§ 31-37, *infra*.

of the chief matters to be investigated is whether or not its removal would leave the premises in a worse condition than they were before it was taken away.¹ This test is to be applied by considering what would be the condition of the realty immediately after the article in question should be removed and before any repairs were made. He who claims the right to take the fixture from the land can not maintain his position merely by showing a readiness on his part to make any repairs which might become necessary because of its removal. If it can not be removed without thereby materially injuring the real property from which it is sought to be taken, it is usually a part of that real property; and that fact alone determines the rights of the parties by whom it is claimed.² Thus, in an early English case, the question at issue was as to the nature of articles composing the stock of a distiller. They consisted of certain stills firmly set in brickwork and let into the ground, vats supported by and resting on brickwork and timber, but not let into the ground, and other vats standing on frames of wood, which likewise were not let into the ground but stood upon the floor. It was decided that the stills were a part of the realty, but that all of the vats were personal property.³ Where a portable grist-mill was fastened to a building by bolts and rods, which passed through the frame timbers and floor joists, and the rods and bolts were secured by nuts firmly fastened upon the ends, the mill being designed for a permanent grist-mill for the neighborhood, it was held to be a part of the realty.⁴

¹ *Elwes v. Maw*, 3 East, 38; *Norton v. Dashwood* (1896), 2 Ch. 497; *McKeage v. Hanover F. Ins. Co.*, 81 N. Y. 38; *Feeder v. Van Winkle*, 53 N. J. Eq. 370; *Capen v. Peckham*, 35 Conn. 88; *Ewell on Fixtures*, p. 8 *et seq.*; *Tyler on Fixtures*, ch. iv.

² The presumption that the fixture is realty, which arises from the fact that its removal must cause injury to the freeholder, is very strong, and has frequently been treated as conclusive. *Wake v. Hall*, L. R. 8 App. Cas. 195; *Wiltshire v. Cottrell*, 1 El. & Bl. 674; *Guthrie v. Jones*, 108 Mass. 191; *McKiernan v. Hesse*, 51 Cal. 594; *Lackas v. Bahl*, 43 Wis. 53; *Tyler on Fixtures*, pp. 226-228. But, of course, express contract may overcome such a pre-

sumption. And it has been held in some cases that, even in the absence of contract, strong and firm annexation so that to remove would be to injure the realty was not absolutely conclusive as to the nature of the fixtures. *Ex parte Moore v. Banking Co.*, L. R. 14 Ch. Div. 379; *Hill v. Wentworth*, 28 Vt. 428; *Allen v. Mooney*, 130 Mass. 155; *Holbrook v. Chamberlin*, 116 Mass. 155; *Crane v. Brigham*, 11 N. J. Eq. 29; *Coe's Estate*, 1 Tucker (N. Y. Surr.), 125; *Ewell on Fixtures*, p. 15 *et seq.*

³ *Horn v. Baker*, 9 East, 215. See also *Voorhees v. McGinnis*, 48 N. Y. 278; *Feeder v. Van Winkle*, 53 N. J. Eq. 370.

⁴ *Potter v. Cromwell*, 40 N. Y. 287.

But portable engines, looms, machinery, or other fixtures, which are loosely fastened to a house by means of cleats, screws, or screw-bolts, or in such a manner that they can be readily removed without injury to the soil or the structure to which they are attached, are more readily held to be personalty, unless a different intention is shown by some of the other tests applied.¹

If the fixture be of a *completory* character, i. e. necessary to make a finished and symmetrical structure of the building with which it is used, it is uniformly held, in accordance with the above-stated principles, to have become a part of the real property.² The removal of such an article must necessarily leave the premises in a deteriorated condition. A tenant for years of a farm removed the clapboards from one side of the house and built an extension upon that side, projecting the roof so as to make it continuous over the entire structure. When he left the farm at the expiration of his lease he could not take away the extension thus built, because to do so would be to leave the building in an incomplete condition.³

§ 19. **Weight, Size, etc., of Fixture.**—The actual annexation of a fixture to real property may consist either in its being fastened into the soil or in or upon some structure on the land, as in the cases above cited under this subdivision, or in its being simply set or placed upon some part of the realty. When there is no actual fastening shown, yet the great weight or bulk of the article, its location upon the land, or its adaptability to the use to which the premises are put may show that it is a part of the real property.⁴ When it is

¹ Davis v. Jones, 2 Barn. & Ald. 165; Minshall v. Lloyd, 2 M. & W. 450; Vanderpoel v. Van Allon, 10 Barb. (N. Y.) 157; Murdock v. Gifford, 18 N. Y. 28; Rogers v. Brokaw, 25 N. J. Eq. 496; McConnell v. Blood, 123 Mass. 47; Chase v. Tacoma Box Co., 11 Wash. 377.

² Warner v. Fleetwood, cited in Herlakenden's Case, 4 Coke, 64; Freidlander v. Rider, 30 Neb. 783; Snedeker v. Waring, 12 N. Y. 170; Watts-Campbell Co. v. Youngling, 125 N. Y. 1; Speiden v. Parker, 46 N. J. Eq. 292; Teaff v. Hewitt, 1 Ohio St. 511.

³ Freidlander v. Rider, 30 Neb. 783; Lawton v. Salmon, 1 H. Bl. 259, note a.

⁴ Powell v. Monson Mfg. Co., 3

Mason (U. S.), 459; Winslow v. Merchants' Ins. Co., 4 Met. (Mass.) 306; Breese v. Bange, 2 E. D. Smith (N. Y.), 474, 491; Pope v. Jackson, 65 Me. 162, 166; Tolles v. Winton, 63 Conn. 440; Hill v. Mundy, 89 Ky. 36; Tyler on Fixtures, p. 104 *et seq.* In Pennsylvania, indeed, adaptation and necessity for the reasonable use of the premises is said to be the chief test, if not the only one. Christian v. Dripps, 28 Pa. St. 271; Morris's Appeal, 88 Pa. St. 368; Williams's Appeal, 16 Atl. Rep. 810. And see Reyman v. Henderson Nat. Bk., 98 Ky. 748; Fairis v. Walker, 1 Bailey L. (S. C.) 540.

very heavy and its location is such as to point towards an intention to make it permanent, it will readily be held to be realty. Accordingly, where a sculptor placed in the grounds in front of his house a statue of Washington, which with its pedestal weighed about three tons and was simply set upon a solid stone foundation without being in any other way fastened to it, it was decided that the statue was a part of the realty; and the same conclusion was reached in reference to a sundial, constructed upon a clock of similar stone and weighing about two hundred pounds, which was appropriately located on a permanent foundation in the same grounds.¹ It is upon this principle that monuments and ornamental shafts and statues in cemeteries or on lawns are usually treated as a part of the realty.²

§ 20. **Adaptability to Premises.** — It is plain from the above discussion that the question of the *adaptability* of the article to the use of the land is of much importance.³ The fixture may be light in weight and loosely attached to the building, or merely set in it or upon the land; and yet be so fitted and appropriated to the premises for the purposes for which they are employed as to be clearly a part of them.⁴ Much stress is laid on this test by some writers and judges. But, here again, although such clear adaptation appear, yet frequently the fixture may be removed as personalty, because it is clearly proved in some way that it was put there with intent to have it removable as a chattel by one who has a right to deal with it in that manner. An illustration of such a one would be a tenant for years or for life.⁵

¹ *Snedeker v. Waring*, 12 N. Y. 170, a leading case; *Strickland v. Parker*, 54 Me. 263, 266; *Bainway v. Cobb*, 99 Mass. 457; *Feeder v. Van Winkle*, 53 N. J. Eq. 370; *Ewell on Fixtures*, p. 25.

² *Oakland Cem. Co. v. Bancroft*, 161 Pa. St. 197; *Tolles v. Winton*, 63 Conn. 440; *Tyler on Fixtures*, p. 57.

³ "For example, look at the machinery in a cotton manufactory; the question to be examined would be, whether the machinery was necessary to constitute the factory, and without it would the building in which it was used be a manufactory at all. Whether the machinery was fast or loose would not determine the question whether it was

a part of the freehold or not; but whether it was particularly adapted to the use of the building, and was really necessary to constitute the building fit for the uses to which it was erected." *Tyler on Fixtures*, p. 102; *Bainway v. Cobb*, 99 Mass. 457; *Pierce v. George*, 108 Mass. 78; *Voorhis v. Freeman*, 2 Watts & S. (Pa. St.) 116; *Lyle v. Palmer*, 42 Mich. 314; *Quimby v. Manhattan Cloth Co.*, 24 N. J. Eq. 260.

⁴ *Lawton v. Salmon*, 1 H. Bl. 259, note a; *Main v. Schwartzwelder*, 4 E. D. Smith (N. Y.), 273; *Tabor v. Robinson*, 36 Barb. (N. Y.) 483, 484; *Day v. Perkins*, 2 Sand. Ch. (N. Y.) 359; *Pothier, de communauté*, § 56.

⁵ See §§ 32-34, 38, *infra*.

§ 21. **Conclusion, as to Annexation.** — In concluding this part of the discussion of fixtures, it is safe to say that the consideration of the manner in which the article is annexed to the land, to ascertain its character as realty or personalty, is largely if not chiefly important as helping to determine the *intent* with which it was placed or used upon the realty. When it is necessary to have it remain there in order to complete the structure to which it is attached or with which it is used, or when it can not be removed without material injury to the soil or building, usually the conclusion is practically resistless that it was placed or used there as a permanent annexation to the realty. In such cases this test alone determines the reasonably presumable intent. When, on the other hand, the fixture is loosely attached to the soil or building and its removal would cause no injury, the *prima facie* conclusion from such attachment alone is that it is personalty. But this may be easily overcome if the application of any of the other *criteria* show a contrary intent on the part of him by whom the fixture was annexed.

3. *Relation between the Parties as a Criterion.*

§ 22. **Relation between Parties, as determining whether Fixtures are Realty or Personalty — Classes of Parties.** — The legal relation between the parties, who are adversely claiming a fixture, is another important *criterion* for determining whether it is realty or personalty. It must be repeated, however, that this test is also to a large extent subsidiary to the determination of the reasonably presumable intent with which the article was annexed to the land or used in association therewith. Such intent on the part of one who has a permanent interest in the real property is apt to be different from that which actuates a temporary owner. Hence this branch of our subject naturally falls into two chief divisions; namely: (1) The effects of the relations between parties interested in realty upon or in connection with which fixtures have been placed or used by one having a permanent interest; and (2) The effects of the relations between interested parties upon fixtures which have been placed on land or used in association with it by one having a temporary interest. The parties between whom the questions arise in the first of these chief divisions are: *a.* Vendor and vendee; *b.* One under

contract to sell and one under contract to buy; *c.* Heirs or devisees and personal representatives of a deceased owner of the land; *d.* Co-tenants of the realty, including tenants in common, joint tenants, coparceners, tenants by the entirety, and partners; *e.* Mortgagor and mortgagee of the realty; *f.* Unpaid vendor, mortgagee, or other lienor of the fixture, and vendee, mortgagee, or other lienor of the realty. Those between whom the questions arise in the second chief division are: *a.* Landlord and tenant for years; *b.* Tenant for life or his personal representatives, and remainderman, reversioner, or other subsequent owner of the land; and *c.* Other kinds of temporary holders and the succeeding owners of the real property. The effects of each of these relationships will be separately considered.

§ 23. (1) **Fixtures placed upon Land by its Permanent Owner.**—In all of those cases in which the attachment to the land has been made by a permanent owner, the general presumption of law, in the absence of positive evidence to the contrary, is that the fixtures have become part of the realty.¹ This is a natural presumption arising from the well known fact that most structures erected upon land by its absolute owners are *intended* to be permanent. But this conclusion may be readily prevented by direct evidence that such was not the intent of him by whom the article was annexed, or by the stronger adverse presumption which may sometimes arise from the application of one or more of the other *criteria* above discussed. Thus, by direct agreement with his mortgagee at the time when he annexes fixtures to his land, a mortgagor may retain them as personal property;² and the owner of land may, of course, so place chattels of any kind upon it as to show clearly by their position, method of annexation, or want of adaptability to the premises that he intended to have them remain personalty.³ In the light of these general rules, each of the relations under this chief division may be briefly examined.

¹ *Lawton v. Salmon*, 1 H. Bl. 259, note *a*; *Elwes v. Maw*, 3 East, 38; *Lawton v. Lawton*, 3 Atk. 13; *Norton v. Dashwood* (1896), 2 Ch. 497; *Snedeker v. Waring*, 12 N. Y. 170; *McFadden v. Allen*, 134 N. Y. 489; *Bainway v. Cobb*, 99 Mass. 457; *Kinsell v. Billings*, 35 Iowa, 154.

² *Heirkamp v. La Motte Granite*

Co., 59 Mo. App. 244; *Christian v. Dripps*, 28 Pa. St. 271; *Boyd v. Shorrock*, L. R. 5 Eq. 72. See *Andrews v. Day Button Co.*, 132 N. Y. 348. But such cases rarely occur; and ordinarily fixtures placed on land by a mortgagor become part of the security for the mortgagee. See last preceding note.

³ Notes on intention, §§ 13, 20, *supra*.

§ 24. *a. Between Vendor and Vendee.*—The presumption is strong, in favor of the vendee, that fixtures are real property and pass to him under the deed. Public policy and in many instances the doctrine of estoppel *in pais* preclude the vendor apparently to increase the value of land by annexing chattels to it, and then, having by such means induced a purchase, to remove from the land the things thus attached.¹ Numerous authorities emphasize this strong presumption in favor of the vendee.² In order to rebut it, the vendor must produce clear evidence of his contrary intent and his absolute fairness in dealing with the purchaser.³

§ 25. *b. Between One under Contract to Sell and One under Contract to Buy.*—The presumption is also strong that fixtures are embraced within a contract for the purchase and sale of the land. He who is under agreement to buy may ordinarily insist that they shall pass by the deed, or may refuse to complete his purchase of the land, though the title to that be good, if the vendor can not give good title to the fixtures.⁴ When one who is in possession of realty under contract to buy it annexes fixtures thereto and then wrongfully fails to complete his purchase, the articles so attached are presumed to have become a part of the realty and to remain the property of the owner of the land. The proposed vendee may obtain title to the fixtures by completing his contract; and, if he fail to do so, his loss of them is occasioned by his own fault.⁵ If, on the other hand, he who is in possession under contract to purchase place fixtures upon the land and then the owner can not or will not convey to him the title, the articles so annexed are presumed to remain the personal property of him who annexed them.⁶ But, of course, in either of these cases such presumption as to the character of the fixtures may be over-

¹ Notes on intention, §§ 13, 20, *supra*.

² *Ogden v. Stock*, 34 Ill. 522; *McFadden v. Allen*, 134 N. Y. 489, 491; *Leonard v. Clough*, 133 N. Y. 292; *Poor v. Oakman*, 104 Mass. 309, 318; *Glidden v. Bennett*, 43 N. H. 306; *Lapham v. Norton*, 71 Me. 83; *Ewell on Fixtures*, p. 274 *et seq.*

³ *Dolliver v. Ela*, 128 Mass. 557; *Hare v. Horton*, 5 Barn. & Ad. 715; *Tyler on Fixtures*, p. 553.

⁴ Authorities in last two preceding notes; *Tyler on Fixtures*, p. 542 *et seq.*

⁵ *Westgate v. Wixon*, 128 Mass.

304; *Mich. Mut. Life Ins. Co. v. Cronk*, 93 Mich. 49; *Kingsley v. McFarland*, 82 Me. 231; *Seatoff v. Anderson*, 28 Wis. 212. But a third party, who under these circumstances has annexed a fixture subject to an agreement with the intended vendee that it shall remain personalty and with the acquiescence of the intended vendor, may remove it even after the intended vendee has broken his contract to purchase. *Brannon v. Vaughan*, 66 Ark. 87.

⁶ *Rush County v. Stubbs*, 25 Kan. 322; *Lapham v. Norton*, 71 Me. 83.

come by positive evidence of the contrary intent of the parties, or by the application of any of the other *criteria* in such manner as to produce a stronger adverse presumption.

§ 26. *c. Between Heirs or Devisees, and Personal Representatives of a Deceased Owner of the Land.*—In early times the heir was always given the benefit of any doubt, in contests between him and the executors or administrators of his deceased ancestor.¹ While he is not aided so strongly by the modern common law, yet he still has in his favor a presumption that the fixtures of his ancestor pass to him with the real property which he inherits and with which they are associated.² Such presumption may be readily rebutted by evidence that the ancestor intended the articles to remain personalty. And the circumstances attending the latter's annexation or use of them are here given full consideration in determining whether he regarded them as part of his realty or intended that they should remain chattels.³ A devisee has in his favor substantially the same rule as that which obtains between the heirs and the personal representatives of a deceased owner of real property. He takes all the fixtures unless the testator is shown to have intended otherwise.⁴ (a)

(a) In New York, the rights of heirs and devisees in fixtures are affected by the following statute: "The following shall be deemed assets and go to the executors or administrators, to be applied and distributed as part of the personal property of the testator or intestate, and be included in the inventory. . . . 4. Things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support. . . . 9. . . . Things annexed

¹ Year Book, 21 Hen. VII. 26 b; *Elwes v. Maw*, 3 East, 38, 51; *Norton v. Dashwood* (1896), 2 Ch. 497; *Bainway v. Cobb*, 99 Mass. 457; *Shepp. Touchst.* 470.

² The English courts at one time manifested a tendency to relax this rule in favor of the personal representatives of a deceased owner of land, especially when the fixture had been placed upon the property for the purposes of trade or manufacture or domestic use. But those cases have since been overruled; and the common law as stated in the text may now be regarded as settled on both sides of the Atlantic. *Fisher v. Dixon*, 12 Cl. & F. 312; *Tuttle v. Robinson*, 33 N. H. 104;

House v. House, 10 Paige Ch. (N. Y.) 158; *Hays v. Doane*, 11 N. J. Eq. 84; *Kinsell v. Billings*, 35 Iowa, 154.

³ Effects of clearly expressed intent, § 13, *supra*. It may be said generally that an heir is a favorite of the law. In several respects this favor has been somewhat relaxed, or done away with by statutes, in modern times. See *Bosley v. Bosley*, 55 U. S. (14 How.) 390, 397, 398; *Goodwin v. Coddington*, 154 N. Y. 283; 2 *Jarman on Wills* (4th Eng. ed.), p. 840, Rules V., VI.

⁴ *Norton v. Dashwood* (1896), 2 Ch. 497; *Dana v. Burke*, 62 N. H. 627; *Tyler on Fixtures*, pp. 701-703. And see *Batterman v. Albright*, 122 N. Y. 484, 488.

§ 27. *d.* Co-tenants, including Tenants in Common, Joint Tenants, Coparceners, Tenants by Entirety, and Partners. — To all of these relationships the general rules as to fixtures, which apply between vendor and vendee, heir or devisee and personal representatives, etc., are applicable. The articles are presumed to be a part of the realty, unless the method of their annexation or use, or other evidence of the intention of the parties, show that they remain chattels.¹ And this is true whether they be placed upon the land by the act of all of the

to the freehold, or to a building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of this section. The right of an heir to any property, not enumerated in this section, which by the common law would descend to him, is not impaired by the general terms of this section." N. Y. Code Civ. Pro. § 2712, subd. 4 and 9, which statute was originally 2 R. S. 82, § 6, subd. 4 and §§ 7, 8. In their original note to this statute the revisers say: "It has been supposed that the same legal character should be given to an article, without reference to the parties in controversy; and that therefore certain fixtures, which are deemed chattels as between landlord and tenant, should be considered in the same light as between executor and heir." (3 R. S. 639, 2d ed.). In the case of *House v. House* (10 Paige, 158), however, Chancellor Walworth decided that the water-wheels, mill-stones, belting apparatus, and running gear of a grist and flour mill, though clearly not fixed into the wall of the house so as to be essential to its support, were parts of the realty and descended with the mill to the heir at law. See also *Walker v. Sherman*, 20 Wend. 636, 645. These decisions were approved and followed in *Buckley v. Buckley*, 11 Barb. 43, and commended in a *dictum* of Johnson, C. J., in *Murdock v. Gifford*, 18 N. Y. 28, 32. And while in *Ford v. Cobb*, 20 N. Y. 344, Denio, J., expresses himself as not entirely satisfied with the reasoning of the Chancellor in *House v. House*, yet he adds: "But as the judgment in that case may be said to have become a rule of property, it should not be disturbed without the greatest consideration, and certainly not in a case like the present, which may be satisfactorily disposed of on other grounds." It may be safely said, therefore, that, at least where the decedent owned both the land and the fixture as a complete establishment or business plant, the heir or devisee takes the fixture the same as at common law; and that, if any change exist by virtue of the statute, it is in the cases in which the article in question was not owned as a part of the ownership of the realty or was applied and used for a purpose substantially distinct from the main purpose of the other structures, i. e., it is not an essential part of one complete business plant or establishment. See *Ewell on Fixtures*, pp. 225-227; *Tyler on Fixtures*, pp. 691-699.

¹ *Parsons v. Copeland*, 38 Me. 537; *Walker v. Sherman*, 20 Wend. (N. Y.) 636; *Baldwin v. Breed*, 16 Conn. 60, 66; *Plumer v. Plumer*, 30 N. H. 558;

Aldrich v. Husband, 131 Mass. 480; *Crest v. Jack*, 3 Watts (Pa.), 238; *Tyler on Fixtures*, p. 707.

co-tenants or by that of one or more of them. It is simply an outgrowth of the general principle by which improvements made by one or more of several co-owners of real property *prima facie* belong to them all.¹

§ 28. *e. Mortgagor and Mortgagee of the Land.*—Several different theories exist in this country as to the nature of a mortgage of real property and the remedies which it affords to the mortgagee.² But the courts of England and of all the United States are agreed that, in determining the rights of parties contending for fixtures, a mortgage is to be treated in the same way as a deed; and the mortgagee is given the same preference over the mortgagor which is accorded to the vendee over the vendor.³ The fixture will be treated as part of the security for the mortgage on the land, unless one or more of the other *criteria* afford evidence strong enough to rebut the presumption that it is realty. The result is the same, as between these parties, whether the mortgage was delivered before or after the chattel was placed upon the real property, or whether it is a mortgage in fee, or for a term of years, or simply of a leasehold interest owned by the mortgagor.⁴ In annexing fixtures to the land after giving the security, the mortgagor is regarded as looking to the redemption of the property when the debt shall become due, and thus as making additions for his own benefit.⁵ However expensive the improvements may be, he can save himself from loss by paying the debt and redeeming the entire property from the mortgage.

§ 29. *f. Unpaid Vendor, Mortgagee, or other Lienor of the Fixture, and Vendee, Mortgagee, or other Lienor of the Land.*—The questions which are presented under this heading may arise from one or more of a number of diverse transactions;

¹ *Cosgriff v. Foss*, 152 N. Y. 104; *Stevens v. Melcher*, 152 N. Y. 551, 565. Of course, by express or implied agreement properly made, additions made to land so held may be removed as his chattels by or for the one who annexes them.

² These are explained at §§ 74–80, *infra*.

³ *Colegrave v. Dias Santos*, 2 B. & C. 76; *Huddersfield Banking Co. v. Lister* (1895), 2 Ch. 273; *Snedeker v. Waring*, 12 N. Y. 170; *Pratt v. Baker*, 92 Hun (N. Y.), 331; *Leland v. Gasset*,

17 Vt. 403; *Burnside v. Twitchell*, 43 N. H. 390; *Rogers v. Brokaw*, 25 N. J. Eq. 496. And see *Nat. Bk. v. Levy*, 127 N. Y. 549, 553; *Tyler on Fixtures*, p. 559 *et seq.*

⁴ *Ibid.*; *Southport Banking Co. v. Thompson*, L. R. 37 Ch. Div. 64; *Joliet First Nat. Bk. v. Adams*, 138 Ill. 483; *Kruger v. Le Blanc*, 75 Mich. 424; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Corliss v. McLagin*, 29 Me. 115; *Ewell on Fixtures*, p. 282.

⁵ *Ibid.*; *McConnell v. Blood*, 123 Mass. 47.

but each of them presents the case of two innocent claimants of a fixture which is on the land of some third party, generally a wrongdoer. Thus, suppose that A purchases of B on credit an engine and heavy machinery, the agreement being that the title to them shall not pass to A until he has fully paid for them, then A fastens them firmly upon his land, upon which C already holds a mortgage or upon which A subsequently gives a mortgage to C, and A does not pay for the fixtures thus annexed to the freehold nor satisfy C's mortgage; the question may arise as to whether B, as an unpaid vendor of the engine and machinery, shall be first entitled to them, or whether C, as mortgagee of the property to which they are attached, shall have a prior claim to them as part of the security for his mortgage debt. So if A, having already annexed fixtures to his land, treat them as chattels and secure a loan to himself from B by a chattel mortgage upon them, and subsequently as security for another loan to himself from C give to C a mortgage purporting to cover the fixtures as well as the land, and neither loan be paid, the question may arise between B and C as to which of their claims upon the fixtures shall have preference. Again, one of the adverse claimants may be a chattel mortgagee of the fixture and the other a mechanic's lienor upon the land; or one may be a conditional vendor of the fixture, while the other is a vendee of the real property to which it is annexed. In short, such questions may be presented whenever a fixture is claimed by two parties, either of whom would be entitled to it as between himself and a third person, and that third person is the one who so dealt with the article as to give it the character of a fixture.

The solution of such questions depends largely upon the extent to which the expressed intention of the owner of the land, at the time when he so annexed or dealt with the chattel, is to be given effect by the courts. Some courts make this expression of intention the chief controlling element, others give it less weight, while still others refuse to give it any material force in arriving at their decisions. There result three distinct rules for the solution of such controversies.

Where treated as Personality. — In those states in which the greater stress is laid on the landowner's expression of intention at the time when he dealt with the fixture as such, the person who by virtue of such dealing holds a chattel mortgage against it, or any other right by a contract treating

it as personalty, is usually given the preference, and may have full satisfaction of his claim before the other party can have the benefit of any interest in the article as realty. Such is the law of New York, Alabama, Indiana, Kansas, Michigan, Texas, and perhaps some other states.¹ This preference is clear when the real-property mortgagee or lienor acquired his interest before the fixture was annexed. But the highest courts in some of these states, and notably in New York and Alabama, have declared that the same rule prevails against him, although he paid a valuable consideration and obtained his lien or interest in the land after the article was affixed thereto, without notice of the existing rights of the other claimant and possibly in the belief, induced by the appearance of the property, that the fixture was a part of his real-estate security.² The fact that the owner of the land *intended* that the article should remain personalty, and at the time of annexing it expressed such intention in his contract with its vendor or chattel mortgagee, is, in the absence of fraud and bad faith on the part of the latter, conclusive, in his favor, in determining it to be that kind of property.³ If the claimant

¹ Tiftt v. Horton, 53 N. Y. 377; Globe Marble Mills Co. v. Quinn, 76 N. Y. 23, 26; Sisson v. Hibbard, 75 N. Y. 542; Rowland v. West, 62 Hun (N. Y.), 583; Brand v. McMahon, 15 N. Y. Supp. 39; Warren v. Liddell, 110 Ala. 232; Thomason v. Lewis, 103 Ala. 426; Binkley v. Forkner, 117 Ind. 182; Eaves v. Estis, 10 Kan. 314; Burrill v. S. N. Wilcox Lumber Co., 65 Mich. 571; Lansing I. & E. Works v. Walker, 91 Mich. 409; San Antonio Brewing Ass'n v. Ice Co., 81 Tex. 99; Cumberland Union Baking Co. v. Hematite Co. (1892), 1 Ch. 415; Ewell on Fixtures, p. 282 *et seq.* The fact that the chattel mortgage has or has not been filed before the real-estate mortgage is made seems to make no difference in such cases. He who is lending money on real-property security, or purchasing the land, need not examine the chattel-mortgage files, and, it seems, is not affected in any way by such filing or the absence of the same. *Ibid.*; especially Brand v. McMahon, 15 N. Y. Supp. 39.

² Mott v. Palmer, 1 N. Y. 564;

Ford v. Cobb, 20 N. Y. 344; Tiftt v. Horton, 53 N. Y. 377, 381; Warren v. Liddell, 110 Ala. 232. See McFadden v. Allen, 134 N. Y. 483.

³ Tiftt v. Horton, 53 N. Y. 377, in which Folger, J., says (p. 383): "The general rules governing the rights of parties in chattels thus annexed to the real estate rest, as it appears, upon the presumptions which the law makes of what their purpose is in the act of annexation. This presumption grows out of their relation to and interest in the land, and not from the relation or interest in it of others which may be opposite. And as the presumption of their purpose grows alone out of their relation and interest, it is repelled by whatever signifies a purpose different; not a different purpose in those holding a relation which may become hostile, but their own different purpose. Hence I conclude that the agreement of the owner of the land with the plaintiffs" (the plaintiffs were the chattel mortgagees), "as it did fully express their distinct purpose that these annexations of boiler and engines should not make

who asserts that the fixture is personal be shown to have obtained his alleged interest fraudulently, or not in good faith, or to have acted so as to be estopped to demand it, the other party, of course, prevails.¹

Where treated as Realty. — In those jurisdictions in which the expressed intention of the owner of the real property is given but little weight in such controversies, the vendee, mortgagee, or other lienor of the land is generally given the preference over him who demands the fixture as personalty. This is the rule more favored in Massachusetts, Maine, Delaware, and possibly one or two other states.² In such jurisdictions, unless the mortgagee or other claimant of the fixture as realty has consented to its being placed or retained on the land as a chattel, or has done some act by which he is estopped to deny that he has so consented, the maxim *quicquid plantatur solo, solo cedit* is given full operation in his favor; he is regarded as the one to whom the owner of the land is reasonably presumed to have intended to pass the fixture, and it goes to him as part of his real-property security. It has been suggested that this rule is adopted in favor of a mortgagee of the land, because in those states and countries where it obtains he is regarded as in effect the owner or purchaser.³ But this suggestion, while showing some reason for the differences in result, does not fully account for the divergence of the rule of New York from that of Massachusetts; for the New York courts give the preference to the claimant of the fixture as a chattel, so long as he is innocent of any fraud or unfair dealing, whether he is contending against a mere *lienor* of the land, such as a mortgagee who is not there regarded as the owner or purchaser of the land, or against an absolute owner, such as a vendee. The real distinction between the two rules lies in the fact that the

them a part of the real estate, was sufficient to that effect without any concurring intention of the defendants as prior mortgagees." *Sisson v. Hibbard et al.*, 75 N. Y. 542; *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23. See *McFadden v. Allen et al.*, 134 N. Y. 489, 494; *Duffus v. Howard Furnace Co.*, 15 N. Y. Misc. 169.

¹ See *Ewell on Fixtures*, pp. 29, 36, 41; *Intent shown by Contract*, § 14, *supra*.

² *Clary v. Owen*, 15 Gray (Mass.), 522; *Pierce v. George*, 108 Mass. 78; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Ridgeway Stone Co. v. Way*, 141 Mass. 557; *Meagher v. Hayes*, 152 Mass. 228; *Hawkins v. Hersey*, 86 Me. 394; *Watertown Steam Engine Co. v. Davis*, 5 Houst. (Del.) 192; *Albert v. Uhrich*, 180 Pa. St. 283.

³ *Folger, J.*, in *Tift v. Horton*, 53 N. Y. 377, at p. 384.

courts of Massachusetts give the more weight to the *presumption* that the permanent owner of land intended his fixtures to be realty in favor of those who claim interests in the land through him; while the New York courts lay the greater stress upon the *expressed intention* of the landowner, as found in the contract between him and the party who insists that the fixture is a chattel.¹

Where the Time of Annexation is most Material.—A third rule for the solving of such questions is adopted by the United States Supreme Court and the courts of New Jersey, New Hampshire, Vermont, Illinois and the majority of the American states; also, in substance, by the English courts. It loses sight almost entirely of the intention of the owner of the land in annexing the fixture, and works out the equities of the parties to the action by determining whether or not the vendee, mortgagee, or other lienor of the land justifiedly relied upon the fixture as constituting a part of the realty at the time when he made his purchase or acquired his lien. If he did so, then he is given the preference; while if he did not, the article is treated as personal property so far as it is necessary to so treat it in order to satisfy first the claim of the other party.² Thus, by this method of deciding between the adverse claims, if a fixture were placed upon the land and a chattel mortgage upon it given to A for money loaned by him to the landowner, and subsequently B without notice of A's rights and for money advanced by him to the landowner were to take a mortgage upon the land with the fixture thus

¹ Between the mortgagor and real-property mortgagee the presumption is practically conclusive that the fixture belongs to the latter, and the former can not remove it as personalty. The argument of the Massachusetts courts is that, since the mortgagor himself can not remove it as a chattel, he can not give to another the right to do so. See cases cited in preceding note, and especially *Clary v. Owen*, 15 Gray, 522.

² *Fosdick v. Schall*, 99 U. S. 235, 251; *United States v. New Orleans R. Co.*, 79 U. S. (12 Wall.) 362; *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267; *Campbell v. Roddy*, 44 N. J. Eq. 244; *Tibbets v. Horne*, 65 N. H. 242; *Page v. Edwards*, 64 Vt. 124; *Paine v. McDowell*, 71 Vt. 28; *Binkley v. Fork-*

ner, 117 Ind. 182, 185; *Simpson Brick Press Co. v. Wormley*, 166 Ill. 383; *German Sav. & Loan Soc. v. Weber*, 16 Wash. 95; *Hobson v. Gorringer* (1897), 1 Ch. 183. Some of the later English authorities favor the real-property mortgagee, who obtained his lien first, only in case he has entered under his mortgage. *Gough v. Wood* (1894), 1 Q. B. 713. And see *Hobson v. Gorringer* (1897), 1 Ch. 183.

Where the articles have become so firmly attached as in effect to have lost their separate identity and become part of the realty, the claimant of them as realty prevails. *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267; *Binkley v. Forkner*, 117 Ind. 176.

annexed to it, B's claim would have the preference and A could take only so much of the value of the fixture as was not needed in satisfying B's mortgage;¹ but if, on the other hand, B were to take his real-estate mortgage *before* the article was annexed to the land and mortgaged to A as a chattel, then A's claim would have the preference, and B could take only so much of the value of the fixture as was not needed to satisfy A's chattel mortgage.² While this rule discards most of the ordinary *criteria* for determining whether a fixture is real property or personalty, it seems to be the principle that is most apt to result in substantial justice.

It should be added that, whatever be the theory upon which this question is decided in any court, if the entire value of the fixture be not needed to satisfy the demand of him in whose favor the decision turns, the residue of its value is held to belong to the other innocent claimant rather than to the owner of the land who has done the wrong. Thus, in those states where the chattel mortgagee or unpaid vendor of the fixture is given the preference, any remaining value of it after his claim is satisfied belongs to the vendee, or mortgagee or other lienor of the real property.³

§ 30. (2) **Fixtures placed upon Land by its Temporary Owner.** — A fundamental proposition of the common law is that fixtures annexed by one man to the land of another are to be regarded *prima facie* as a part of that land.⁴ Contract express or implied, or natural equities between the parties, may show, however, that this is not the nature of some such articles. And the development in business enterprise and wealth in personalty and some modifications of the relation of landlord and tenant have engrafted important modern exceptions upon the original rule. The rise, growth, and results of those exceptions are to be next examined. They appear in

¹ *Hobson v. Gorringe* (1897), 1 Ch. 183; *Tibbets v. Horne*, 65 N. H. 242. See *Sowden v. Craig*, 26 Iowa, 156.

² *Campbell v. Roddy*, 44 N. J. Eq. 244; *General Elec. Co. v. Transit Equip. Co.*, 57 N. J. Eq. 460; *Buzzell v. Cummings*, 61 Vt. 213; *Dillon v. Barnard*, 88 U. S. (21 Wall.) 430, 440. See *Phoenix I. W. Co. v. N. Y. Security Co.*, 83 Fed. Rep. 757.

Purchasers of realty at execution sales acquire no more right than that held by the judgment debtors. Hence

they can not take fixtures against the claims of persons who have sold them to the debtors, or loaned money on them under agreements that they shall remain personalty. *Manwaring v. Jenison*, 61 Mich. 117; *Young v. Baxter*, 55 Ind. 188; *Kinsey v. Bailey*, 9 Hun (N. Y.), 452.

³ Preference of real-property mortgagee over mortgagor, § 28, *supra*; especially *Snedeker v. Waring*, 12 N. Y. 170; *Rogers v. Brokaw*, 25 N. J. Eq. 496.

⁴ § 10, *supra*.

connection with three general classes or divisions of relationships to the land; namely: *a.* That of landlord and tenant for years; *b.* That of tenant for life or his personal representatives, and reversioner, remainderman, or other owner of the subsequent interest in the land; and *c.* Other kinds of temporary holders or tenants and the succeeding owners of the real property. It is in this general department of its consideration that the unfolding and scope of the law of fixtures are most readily traced and understood.

§ 31. *a. Fixtures annexed by Tenant for Years.*—The tenant of real property for a term of years, as he is known to-day, did not exist in common-law jurisdictions previous to the reign of Henry VI. Before that time he who held the land of another for such a limited period was a mere agent or bailiff of the landowner.¹ He could not retain the property against the will of his employer or principal. Everything that he annexed to or placed upon the freehold, in such a manner as to make it a fixture, he so placed there as the agent or representative of the owner of the real property, and thus made it a part of the land.² As soon as actions for waste were permitted against such an agent or bailiff in possession of the realty, they began to be brought for his acts in removing such annexations; and the questions thus presented were at first uniformly decided in favor of the owner of the land.³ The maxim *quicquid plantatur solo, solo cedit* was given full operation in such instances.⁴ And whatever might be the

¹ Com. Dig. Landl. & T. 5; Smith, Landl. & T. 8-12; Goodtitle v. Tombs, 3 Wils. 118, 120; Campbell v. Loder, 3 Hurl. & C. 520, 527, n.; 1 Cruise Dig. 258.

² Co. Lit. 53 a, 57 a; Gibson v. Hammersmith Railway Co., 32 L. J. Ch. 337.

³ Tyler on Fixtures, p. 150; notes to Elwes v. Maw, 3 East, 38.

⁴ "If we call to mind the peculiarity of the relation subsisting in old times between the lessor and his lessee, — a relation in which *status* was everything and in which contract had no place, the tenant being the mere bailiff or agent of his landlord, — we can readily understand how, in that early state of society and of property, the maxim *accessio cedit principali* found unobstructed operation. From this maxim, which in its special application to land assumed in

the civil law the form of *solo cedit quod solo inædificatur*, and in our law the form of *quicquid plantatur solo, solo cedit*, it followed, in virtue of the relation aforesaid subsisting between landlord and tenant, that *everything of whatever sort put up upon or put into the soil by the tenant became part and parcel of the soil, and the tenant had no right even during his term to remove or to unfix it again.* It was, in fact, the landlord's fixture from the first, and the tenant had neither any property in it, nor any right nor power over it, beyond its use, in this the earliest phase of the agricultural relation, or so long as this phase of that relation continued. And it is matter of history that the primitive relation subsisted in all its unmitigated rudeness for a period sufficient to allow the full development of the law of agricultural fixtures purely

nature of the articles, or for whatever purpose their annexation to the land might have been made, the presumption was that they belonged to the landlord and could not, against his will, be unfixed or removed by the bailiff-tenant.

By virtue of a number of statutes, the first of which was enacted in the time of Edward I. and the last during the reign of Henry VI., the relation between the landowner and his tenant was gradually changed, until the latter came finally to be recognized, as he now is, as the owner of an interest or estate in the land, which he can maintain during his term against his landlord and all other persons, and the possession of which he may regain by action when wrongfully deprived of the same.¹ Partly as a result of this change in their position and rights, and largely also for the purpose of encouraging such temporary owners carefully to cultivate and improve the realty and to pay good rents, important exceptions have been engrafted one by one upon the ancient rule as to fixtures associated with land by tenants for years.

§ 32. (a) **Trade Fixtures.**—The first of those exceptions was made in relation to articles placed upon the land by the tenant *for purposes of trade or manufacture*. It was, accordingly, held by Lord Holt, in *Poole's Case*,² that a soap-boiler might remove, during his term, the soap vats, coppers, kettles, etc., which he had set up upon the demised premises for the purpose of his manufacture and trade and the removal of which would not injure the freehold. Since that decision, in 1704, this exception has been generally recognized. And such articles as temporary sheds or buildings,³ the counters, shelves, and other fixtures in a store,⁴ copper-stills and kettles

and simply so called, that is to say, of erections and other things which were indispensable to the bare or necessary enjoyment or culture of the land as such." *Brown's Law of Fixtures* (4th ed., 1881), p. 7. See *People ex rel. Int. Nav. Co. v. Barker*, 153 N. Y. 98.

¹ This change was completed probably not later than the year 1458. 1 Wash. R. P. p. *291, note (6th ed., § 608); 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 106 *et seq.*

² 1 Salk. 368. See *Elwes v. Maw*, 3 East, 38, and notes.

³ *Kissam v. Barclay*, 17 Abb. Pr. (N. Y.) 360; *Devin v. Dougherty*, 27 How. Pr. (N. Y.) 455; *Lewis v. Ocean*

Nav. & P. Co., 125 N. Y. 341; *Talbot v. Cruger*, 151 N. Y. 117; *Smith v. Whitney*, 147 Mass. 479; *Firth v. Rowe*, 53 N. J. Eq. 520; *Shellar v. Shivers*, 171 Pa. St. 569; *Macdonough v. Starbird*, 105 Cal. 15; *Carr v. Georgia R. Co.*, 74 Ga. 73.

⁴ *Tabor v. Robinson*, 36 Barb. (N. Y.) 483, 485; *Guthrie v. Jones*, 108 Mass. 191; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Ombony v. Jones*, 19 N. Y. 234; *Asheville Woodworking Co. v. Southwick*, 119 N. C. 611; *Cubbins v. Ayres*, 4 Lea (Tenn.), 329; *Berger v. Hoerner*, 36 Ill. App. 360; *Felcher v. McMillan*, 103 Mich. 494; *Tyler on Fixtures*, p. 230 *et seq.*

for distilling,¹ engines and machinery,² and the like have been allowed to be removed by the tenant, if they could be detached without injury to the building or land.³ The expression "trade fixtures" is commonly employed to include all such articles as are embraced within this exception.⁴ And the word "trade" is given a wide meaning in this connection, and includes practically everything annexed to land for the pecuniary advantage of the tenant and not entirely for agricultural purposes.⁵

§ 33. (b) **Domestic Fixtures.** — The second exception, which the common law recognized in favor of the tenant for years, relates to articles placed by him upon the land *for domestic use and convenience and the necessary enjoyment of the premises*. This class of articles is usually denominated *domestic fixtures*. It includes things employed for ornament or utility or both.⁶ Thus, stoves,⁷ portable bath-tubs, ranges and heaters,⁸ ornamental chimney-pieces, pier glasses and hangings, and wainscot fixed only by screws⁹ are illustrations of such fixtures.¹⁰

¹ Reynolds v. Shuler, 5 Cow. (N. Y.) 323; Holmes v. Tremper, 20 Johns. (N. Y.) 29; Moore v. Smith, 24 Ill. 512.

² Minshall v. Lloyd, 2 M. & W. 450; Globe Co. v. Quinn, 76 N. Y. 23; Andrews v. Day Button Co., 132 N. Y. 348; Heffner v. Lewis, 73 Pa. St. 302; Smith v. Whitney, 147 Mass. 479; Conrad v. Saginaw Mining Co., 54 Mich. 249; Hewitt v. General Electric Co., 61 Ill. App. 168; Merritt v. Judd, 14 Cal. 59; Brown v. Reno Electric Co., 55 Fed. Rep. 229.

³ Ibid.; also Wake v. Hall, L. R. 7 Q. B. Div. 295; Wiggins Ferry Co. v. Ohio, etc. R. Co., 142 U. S. 396; Wall v. Hinds, 4 Gray (Mass.), 256, 271; Conner v. Coffin, 22 N. Y. 538; Powell v. McAshan, 28 Mo. 70; Seeger v. Pettit, 77 Pa. St. 437; Tyler on Fixtures, pp. 148-158; Ewell on Fixtures, pp. 80-110.

⁴ Ibid.

⁵ Van Ness v. Pacard, 27 U. S. (2 Pet.) 137; Holmes v. Tremper, 20 Johns. (N. Y.) 29; Wall v. Hinds, 4 Gray (Mass.), 256; Elwes v. Maw, 3 East, 38; Union T. Co. v. W. & S. F. R. Co., 116 Iowa, 392; Ewell on Fixtures, pp. 80-110.

⁶ Elwes v. Maw, 3 East, 38, 53;

Bishop v. Elliott, 11 Ex. 113; Lawrence v. Kemp, 1 Duer (N. Y.), 363.

⁷ Roffey v. Henderson, 17 Q. B. 574, 575; Lawrence v. Kemp, 1 Duer (N. Y.), 363.

⁸ Guthrie v. Jones, 108 Mass. 191; Lawton v. Lawton, 3 Atk. 13; Lawton v. Salmon, 1 H. Bl. 259, 260, note a.

⁹ *Ex parte Quincy*, 1 Atk. 477; Lawton v. Lawton, 3 Atk. 13; Beck v. Rebow, 1 P. Wms. 94; Grymes v. Bowren, 6 Bing. 437; Leigh v. Taylor (1902), App. Cas. 157; Wall v. Hinds, 4 Gray (Mass.), 256; Gaffield v. Hapgood, 17 Pick. (Mass.) 192.

¹⁰ Some cases, as early as those which recognized trade fixtures as belonging to the tenant, had recognized ornamental fixtures as also the tenant's property. But the authority of these was denied in other decisions. In 1743, Lord Hardwicke regarded the question as settled in favor of the tenant (Lawton v. Lawton, 3 Atk. 13, 16), and in the leading English case of Elwes v. Maw (3 East, 38, 53), decided in 1803, Lord Ellenborough, after speaking of the exception of trade fixtures in the tenant's favor, says: "The indulgence in favor of the tenant for years during the term has been carried still further, and he

The cases under this head are not very numerous; but they make clear the law that such things may be removed by the tenant, if the severance from the realty will not materially injure it nor destroy the essential character of the fixtures as articles of personalty.¹

§ 34. (c) **Agricultural Fixtures.**—A third exception, generally recognized in favor of the tenant for years by the common law of the United States, but not by that of England, relates to articles placed by him upon the land *for agricultural purposes*. Illustrations of such fixtures are nursery trees,² hop-poles,³ fences,⁴ and buildings erected for purposes of husbandry.⁵

The ancient common law, which so strongly favored the landlord as against his so-called tenant, — his mere bailiff or agent, — was formulated in this respect chiefly upon questions of waste committed by farmer tenants in removing agricultural appliances from the land. It was attempted in England, in the principal case of *Elwes v. Maw*,⁶ to break through the rule of *stare decisis*, and to extend to agricultural fixtures the same liberal principle in the tenant's favor which had been accorded him in regard to trade fixtures. But the court refused to allow such an extension, and held, on the principle of *stare decisis*, and also because to hold otherwise would be "to introduce a dangerous innovation into the relative state of rights and interests holden to subsist between landlords and tenants,"⁷ that fixtures placed upon the land for purposes of agriculture should be presumed to be the property of the

has been allowed to carry away matters of ornament, as ornamental marble chimney-pieces, pier glasses, hangings, wainscot fixed only by screws, and the like." See Tyler on Fixtures, pp. 357-369; Ewell on Fixtures, pp. 127-137; 2 Taylor, Landl. & T. (8th ed.) p. 153; 2 Smith's L. C. p. *198 *et seq.*

¹ Ibid.; *Hanrahan v. O'Reilly*, 102 Mass. 201; *Ambs v. Hill*, 13 Mo. App. 585; *Wright v. Du Bignon*, 114 Ga. 765.

² *Brooks v. Galster*, 51 Barb. (N. Y.) 196.

³ *Wing v. Gray*, 36 Vt. 261.

⁴ *Mott v. Palmer*, 1 N. Y. 564, 572.

⁵ *Elwes v. Maw*, 3 East, 38; *Van Ness v. Pacard*, 27 U. S. (2 Pet.) 137, 145; *Perkins v. Swank*, 43 Miss. 349;

McMath v. Levy, 74 Miss. 450; *Holmes v. Tremper*, 20 Johns. (N. Y.) 29; *Tyler on Fixtures*, pp. 271-317; *Ewell on Fixtures*, pp. 110-127.

⁶ 3 East, 38.

⁷ Per Ld. Ellenborough, 2 Smith's L. C. p. *188. And he adds: "But the danger or probable mischief is not so properly a consideration for a court of law, as whether the adoption of such a doctrine would be an innovation *at all*; and, being of opinion that it would be so, and contrary to the uniform current of legal authorities on the subject, we feel ourselves, in conformity to and in support of those authorities, obliged to pronounce that the defendant had no right to take away the erections stated and described in this case."

landlord. Some exceptions to this rule have since then been made in England by statute,¹ but the common law of that country has remained unchanged.

This strict English law was not adapted to the circumstances and needs of the American colonies and states. All that could be done to encourage the clearing of the soil and thrifty husbandry was here required from the courts. In many of the United States, therefore, agricultural fixtures are allowed to be taken away by the tenant.² This exception, however, is not even here so strongly favored nor so universally recognized as are those which relate to trade fixtures and to fixtures for domestic use and convenience and the necessary enjoyment of the premises.³

§ 35. **Summary of Exceptions in Favor of Tenants for Years.**—It follows from the above discussion that fixtures placed upon land or used in association with it by a tenant for years are presumptively the property of the landlord; but if they can be removed without injury to the freehold, and are employed for trade, domestic use, or agricultural purposes (though the latter class is not included by the common law of England), they are exceptions to the general rule and may ordinarily be taken away by the tenant as his own property. Since these exceptions are so broad in their scope and include nearly all articles that are ever affixed to real property by temporary owners, the statement is often made by judges and text-writers that the *presumption* as to articles annexed to the premises by a tenant is in his favor. But this is neither logically nor historically accurate. The tenant can not maintain his right to an article merely by showing that it is a fixture placed upon the property by himself and removable without injury to the freehold. He must also prove that it is either a trade fixture, or a domestic fixture, or (in this country) an agricultural fixture. If he fail to bring it within one of these classes, it is presumed to be real property and to belong to the landlord.⁴ And it must be repeated here that,

¹ 14 & 15 Vict. ch. 25, § 3; 38 & 39 Vict. ch. 92; 2 Smith's L. C. pp. *196, *197; Brown on Fixtures, pp. 26-39.

² Notes 2-5, p. 40, *supra*.

³ See Van Ness v. Pacard, 27 U. S. (2 Pet.) 137, 143; Harkness v. Sears, 26 Ala. 493; McCullough v. Irvine's Executors, 13 Pa. St. 438; Carver v.

Gough, 153 Pa. St. 225; Davis v. Eastham, 81 Ky. 116; Ewell on Fixtures, p. 112 *et seq.*

⁴ Ombony v. Jones, 19 N. Y. 234; Kissam v. Barclay, 17 Abb. Pr. (N. Y.) 360; Schlemmer v. North, 32 Mo. 206; Madigan v. McCarthy, 108 Mass. 376, 377; Ewell on Fixtures, pp. 134-136.

even when the character of the article itself would bring it within one of these exceptions in favor of the tenant, the application of one or more of the other *criteria* may show that it was put upon the land with the *intention* of making it a part of the realty; and thus the result may be the retention of it by the landlord as a portion of his property.

§ 36. **Time when Tenant for Years may remove Fixtures.**—The landlord and tenant may, of course, vary their rights as to fixtures by any agreement into which they may see fit to enter.¹ And they may thus designate the time within which the articles may be removed by the tenant.² When the time of removal is not settled by contract, the law in England and in most of the United States is that the tenant must take away his fixtures within the term of his lease, or during such further time as he retains possession of the real property in his character as a tenant, or they will become the property of the landlord. When he actually surrenders the premises to the landlord, whether before, or at, or after the expiration of the time designated in the lease, the tenant, in the absence of agreement to the contrary, ordinarily relinquishes his right to all articles thereon which are not unquestionably personal property.³ But in Pennsylvania, Illinois, Missouri and Kentucky it has been declared that, within a reasonable time after the expiration of his lease and the concurrent surrender of the premises, the tenant may lawfully take away as his own such fixtures as he might have so removed during his term.⁴ In *any* jurisdiction, moreover, where the removal during the term has been prevented by the landlord, the tenant has a reasonable time after its expiration in which to take away his fixtures.⁵ And the same privilege is accorded him when

¹ *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Thorn v. Sutherland*, 123 N. Y. 236; *Torrey v. Burnett*, 38 N. J. L. 457; *McIlver v. Estabrook*, 134 Mass. 550.

² *Ibid.*

³ *Weeton v. Woodcock*, 7 M. & W. 14; *Penton v. Robart*, 2 East, 98; *Ex parte Brook*, L. R. 10 Ch. Div. 100; *Sampson v. Camperdown Cotton Mills*, 64 Fed. Rep. 939; *Talbot v. Cruger*, 151 N. Y. 120; *Lewis v. Ocean Nav. & P. Co.*, 125 N. Y. 341; *McIlver v. Estabrook*, 134 Mass. 550; *Trask v. Little*, 182 Mass. 8; *Sullivan v. Carberry*, 67 Me. 531; *Preston v. Briggs*, 16 Vt. 124; *Stokoe*

v. Upton, 40 Mich. 581; *Mueller v. C. M. & St. P. R. Co.*, 111 Wis. 300; *Griffin v. Ransdell*, 71 Ind. 440. See So. Dak. Comp. L. 1887, § 3206.

⁴ *Shellar v. Shivers*, 171 Pa. St. 569; *Berger v. Hoerner*, 36 Ill. App. 360; *Walsh v. Sichler*, 20 Mo. App. 374; *Caperton v. Stege*, 91 Ky. 351; *Chalifoux v. Potter*, 113 Ala. 215.

⁵ *Mason v. Fenn*, 13 Ill. 525; *Bircher v. Parker*, 40 Mo. 118; *Goodman v. Hannibal & St. J. R. Co.*, 45 Mo. 33; *Podleck v. Phelan*, 13 Utah, 333. See *Lewis v. Ocean Nav. & P. Co.*, 125 N. Y. 341, 345; *Burk v. Hollis*, 98 Mass. 55.

the time at which the term will end depends on a contingency, or is for any reason uncertain, and it may be terminated unexpectedly to the tenant.¹ In no case, however, has it been held that, if the lease be terminated by breach of contract by the tenant and the re-entry of the landlord, the tenant can thereafter remove fixtures from the demised premises.²

§ 37. **Effect of Renewal of Lease on Right to Fixtures.** — In those cases in which the lessee has erected removable fixtures upon the land, and then, after the expiration of the term during which he so erected them, has remained continuously in possession under a renewal lease, but without any agreement concerning the fixtures, there is direct conflict of authority as to his right to them during the last term or at its expiration. What may be fairly designated as the New York rule upon this matter is that the tenant thereby loses his title to such fixtures and his right to remove them. The reason stated for this rule, in the leading case of *Loughran v. Ross*,³ is that the acceptance of the new lease of the premises, without reservation of right or mention of any claim to the fixtures, and occupation under the new letting are equivalent to a surrender of the possession of the entire property, including the fixtures, to the landlord at the expiration of the first term. "The tenant is in under a new tenancy, and not under the old; and the rights which existed under the former tenancy, and which were not claimed or exercised, are abandoned as effectually as if the tenant had actually removed from the premises, and after an interval of time, shorter or longer, had taken another lease and returned to the premises."⁴ While this is admitted to be "quite technical reasoning,"⁵ yet it has been steadily adhered to in the state of New York;⁶ and the same rule has been followed in England, Massachusetts, Pennsylvania, New Jersey, Maryland, Indiana, California,

¹ *Martin v. Roe*, 7 El. & Bl. 237; *Reynolds v. Shuler*, 5 Cow. (N. Y.) 323; *Loughran v. Ross*, 45 N. Y. 792, 794; *Ellis v. Paige*, 1 Pick. (Mass.) 43; *Watriss v. Cambridge Nat. Bk.*, 124 Mass. 571; *Nor. Cent. R. Co. v. Canton Co.*, 30 Md. 347; *Cromie v. Hoover*, 40 Ind. 49.

² *Pugh v. Acton*, L. R. 8 Eq. 626; *Kutter v. Smith*, 69 U. S. (2 Wall.) 491; *Mass. Nat. Bk. v. Shinn*, 18 N. Y. App. Div. 276; *Davis v. Moss*, 38 Pa.

St. 346; *Keogh v. Daniell*, 12 Wis. 163.

³ 45 N. Y. 792, 794.

⁴ *Loughran v. Ross*, 45 N. Y. 792, 794.

⁵ *Lewis v. Ocean Nav. & P. Co.*, 125 N. Y. 341, 350.

⁶ *Talbot v. Cruger*, 151 N. Y. 117; *Stephens v. Ely*, 162 N. Y. 79. See *Bernheimer v. Adams*, 70 N. Y. App. Div. 114.

and probably a majority of the American states in which the question has arisen.¹

The opposing rule is that of Michigan, which is followed in Wisconsin, Minnesota, Texas, and perhaps a few other states.² In the leading case of *Kerr v. Kingsbury*,³ upon this side of the controversy, Judge Cooley severely criticises the argument of the New York courts, and insists on the right of the lessee to remove the fixtures while he remains in possession under his renewal lease, or continuously as lessee after its expiration. He bases his conclusion upon the ground that the reason for usually requiring the lessee to remove fixtures during his term is in order that the subsequent possession of the lessor may not be disturbed by their removal; and such reason does not operate so long as the lessee himself retains possession of the land. He says, among other things: "A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time he has a right to regard himself as occupying in the character of a tenant."⁴

While the New York rule in such cases may be more logically in accord with the history and development of the law of fixtures and that of landlord and tenant in England, and as a settled law of property should not be disturbed probably in those states in which it has been adopted; yet the rule of Michigan accords better with the more liberal policy of most of the American courts in regard to fixtures, and seems to be most apt to result in substantial justice to all parties interested in erections on demised premises.

§ 38. *b. Fixtures annexed by Life Tenant.* — Substantially the same principles should control the right to fixtures

¹ *Thresher v. East London Water Works*, 2 B. & C. 608; *Watriss v. Cambridge First Nat. Bk.*, 124 Mass. 571; *Darrah v. Baird*, 101 Pa. St. 265; *Gerbert v. Sons of Abraham*, 59 N. J. L. 160; *Carlin v. Ritter*, 68 Md. 478; *George Bauernschmidt B. Co. v. McCogan*, 89 Md. 135; *Hedderich v. Smith*, 103 Ind. 203; *Marks v. Ryan*, 63 Cal. 107; *Sanitary Dist. v. Cook*,

169 Ill. 184; *Leman v. Best*, 30 Ill. App. 323.

² *Kerr v. Kingsbury*, 39 Mich. 150; *Bank v. O. E. Merrill Co.*, 69 Wis. 501; *Wright v. Macdonnell*, 88 Tex. 140.

³ 39 Mich. 150; s. c. 33 Amer. Rep. 362.

⁴ 39 Mich. 150, 152; 33 Amer. Rep. 362, 364.

between a tenant for life and the succeeding owner of the land as those which apply to the relation of landlord and tenant for years. When, therefore, the article is a trade fixture, or is employed for domestic use and convenience, and its removal will not injure the realty, the life tenant who annexed it may take it away during his life; or, if he fail to do so, then, after his death, it may be removed by his executors or administrators.¹ This right has been denied as to agricultural fixtures;² but there is good authority in favor of treating these also as removable.³ Since the life tenant's interest in the real property is always of uncertain duration, he is not required to remove his fixtures while it continues.⁴ In this particular, then, his rights in such annexations differ from those of an ordinary owner for years. But if a tenant for life voluntarily surrender his interest in the premises and give up possession without removing his fixtures, or if his holding terminate by breach of contract on his part and entry by the succeeding owner, he has no right to enter and remove them.⁵ When his natural death terminates his estate, as is ordinarily the case, it is just and proper that his executors or administrators should have a reasonable time thereafter within which to remove fixtures. Yet it is conceived that no such right should be allowed them, if he committed suicide or otherwise voluntarily terminated his own interest in the land.⁶

¹ *Lawton v. Lawton*, 3 Atk. 13; *Lord Dudley v. Lord Warde*, Ambler, 112, 113; *Leigh v. Taylor* (1902), App. Cas. 157; *Lawton v. Salmon*, 1 H. Bl. 259; *Elwes v. Maw*, 3 East, 38; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Harkness v. Sears*, 26 Ala. 493; *Whiting v. Brastow*, 4 Pick. (Mass.) 310; *Johnson's Ex'rs v. Wiseman's Ex'rs*, 4 Metc. (Ky.) 357, 360; *Buckley v. Buckley*, 11 Barb. (N. Y.) 43, 61; *Williams on Executors* (7th Am. ed.), 862.

A lessee of a life tenant has the same rights as the life tenant himself. *White v. Arndt*, 1 Whart. (Pa.) 91; *Cannon v. Hare*, 1 Tenn. Ch. 22; *Haffick v. Stober*, 11 Ohio St. 482.

² *Haffick v. Stober*, 11 Ohio St. 482; *McCullough v. Irvine*, 13 Pa. St. 438; *Gliddon v. Bennett*, 43 N. H. 306. See *Demby v. Parse*, 53 Ark. 526; *Albert v. Uhrich*, 180 Pa. St. 283; *Doak v. Wiswell*, 38 Me. 569.

³ *Overman v. Sasser*, 107 N. C. 432; *Whiting v. Brastow*, 4 Pick. (Mass.) 310.

⁴ Last three preceding notes, and especially *Lawton v. Lawton*, 3 Atk. 13.

⁵ *London Loan Co. v. Drake*, 6 C. B. n. s. 798; *Ex parte Brook*, L. R. 10 Ch. Div. 100; *Thropp's App.*, 70 Pa. St. 395; *Ex parte Hemenway*, 2 Lowell (U. S.), 496; *Tyler on Fixtures*, p. 491.

⁶ The questions before the courts as to the rights of life tenants and their personal representatives to fixtures have not been very numerous. It has been asserted by some judges and text writers that the law is not so liberal in their favor as it is in favor of tenants for years. *Dudley v. Warde*, Ambler, 112, 113; *Albert v. Uhrich*, 180 Pa. St. 283; *Elwes v. Maw*, 3 East, 38; *Kerr on R. P.* § 133. Yet there seems to be no tangible distinction pointed out, nor any reason for one; and a careful and ex-

§ 39. *c. Fixtures annexed by other Temporary Owners of the Real Property.* — The principles above explained, as to the fixtures of the designated temporary owners of realty, apply generally to all tenants, or holders whose interests are not permanent. Those principles may be summarized in three general propositions; namely: (a) Trade, domestic, or agricultural (in the United States) fixtures, which can be detached without injury to the real property, may ordinarily be removed as personalty by the temporary owner who annexed them; (b) When the time during which he is to retain the real property is fixed and definite, or when such time being in itself uncertain he causes his tenancy to terminate by his own act or fault, then he must remove them within his term or during such further time as he retains possession of the real property in his character as tenant, or he can not remove them at all; and (c) When the time during which he is to retain the real property is uncertain and he does not cause his tenancy to end by his own act or fault, or when his tenancy which was by its terms definite and certain is prematurely terminated without his act or fault, then he or his personal representatives, as the case may be, have a reasonable time after the expiration of the tenancy within which to remove such fixtures. These propositions are supported by the great weight of authority; although, as is above pointed out, they are to some extent qualified or repudiated in a few jurisdictions. Applying them to the less important cases of temporary ownership, which have not yet been considered, they will readily solve, in harmony with the decided cases, most of the questions which arise as to the fixtures of such temporary owners.

It follows, for example, that, between a tenant in tail,¹ or his personal representatives, and the succeeding owner, since the duration of the estate of such tenant is uncertain, the same rules as to fixtures apply as those which prevail in the relation of a life tenant or his personal representatives and

haustive writer has summed the matter up as follows: "Lord Hardwicke seems to treat the question of fixtures, as between the representatives of tenants for life or in tail, and the remainderman, in about the same light as between landlords and tenants for years; and there does not seem to be any reported

case, the determination of which has proceeded upon a known or recognized distinction between these parties." Tyler on Fixtures, p. 492.

¹ For definition and explanation of tenancy in tail, or estates tail, see § 72, *infra*.

the subsequent owner.¹ The tenant at will² has generally the same rights and privileges as to fixtures as those which belong to a tenant for years; and, if his holding be suddenly terminated by the landlord, he has a reasonable time after abandoning possession within which he may remove them.³ And the same is true of a tenant at sufferance.⁴ A tenant from year to year or from month to month, etc.,⁵ is, during the time for which his holding is running, practically the same in this respect as a tenant for years; and the law of fixtures is the same as to him as it is in regard to a tenant for years.⁶

§ 40. **Fixtures — Conclusion.** — The application of the *criteria* which are discussed in the preceding pages will, in most cases, readily determine to which of the two great classes of property a fixture belongs. Sometimes some one of the tests alone is decisive of the question, sometimes two or all of them must be applied. But it will always materially aid in the investigation to remember that the reasonably presumable intent of him who annexed the article to the land or used it in association therewith is generally the inquiry of primary importance, and that the other *criteria* are subordinate means for the determination of that question. And it is to be also steadily borne in mind that, if the fixture be attached so as

¹ Tyler on Fixtures, p. 483; note to *Elwes v. Maw*, 2 Smith's L. C. pp. *169, *206.

² For definition and explanation of such tenancy, see § 73, *infra*.

³ *Martin v. Roe*, 7 El. & Bl. 237; *Cromie v. Hoover*, 40 Ind. 49; *Lewis v. Ocean Nav. & P. Co.*, 125 N. Y. 341.

⁴ For definition and explanation of this tenancy, see § 73, *infra*; *Lewis v. Ocean Nav. & P. Co.*, 125 N. Y. 341.

⁵ For definitions and explanations of these tenancies, see § 73, *infra*.

⁶ *Martin v. Roe*, 7 El. & Bl. 237; *Sullivan v. Carberry*, 67 Me. 531. Those claiming under any of the parties whose rights to fixtures are discussed in the text stand in the shoes of those through whom they claim, and are bound generally by the same rules and principles. Thus an assignee in bankruptcy has the same rights as to such articles as those

which belonged to his assignor, and, as against third parties, a vendee has the same rights that were his vendor's. *Horn v. Baker*, 9 East, 215; *Minshall v. Lloyd*, 2 M. & W. 450; *Gaffield v. Hapgood*, 17 Pick. (Mass.) 192; *Fitzgerald v. Anderson*, 81 Wis. 341; *Tyler on Fixtures*, p. 633 *et seq.* And an execution creditor possesses the same rights which belonged to his debtor. *Morey v. Hoyt*, 62 Conn. 542; *Freidlander v. Ryder*, 30 Neb. 783, 785; *Thropp's App.*, 70 Pa. St. 395. If, therefore, the execution were one which could reach personal property only, the sheriff could not ordinarily take the fixtures from land of which the debtor was a permanent owner, while he would be able, in most instances, to reach fixtures erected by the debtor for trade, agricultural, or domestic purposes upon land in which such debtor had only a temporary interest. *Ibid.*

to be completory of the building, or so that its removal (no repairs being made) would in itself injure the property, that fact alone is ordinarily conclusive evidence of the intention that it should be a part of the realty. When it can be removed without injury, the *criteria* are to be applied successively or together, in the light of all the circumstances of each case.

CHAPTER III.

PROPERTY, OTHER THAN FIXTURES, THAT IS SOMETIMES REAL AND SOMETIMES PERSONAL.

§ 41. What may be sometimes realty and sometimes personalty.	§ 48. Buildings erected on one's land with his consent.
§ 42. Money.	§ 49. Rolling-stock of railroads.
§ 43. Stock of a corporation.	§ 50. Water and ice.
§ 44. Right of action for injury to real property.	§ 51. Vegetable products of the earth.
§ 45. Gas and electric light fixtures and appliances.	§ 52. <i>Fructus industriales.</i>
§ 46. Buildings.	§ 53. <i>Fructus naturales.</i>
§ 47. Buildings erected on one's land without his consent.	§ 54. Manure.
	§ 55. Pew rights.
	§ 56. Burial rights.
	§ 57. Heir looms.

§ 41. **What Things may be sometimes Realty and sometimes Personalty.**—The nature and characteristics of a number of articles, which may readily change from one species of property to the other but are not usually fixtures, have been from time to time investigated and determined by the courts. They are ordinarily not fixtures, because the questions concerning them in the various positions in which they are commonly found have been decided, and they do not now call for the application of the tests which are required to determine whether fixtures are realty or personalty. Illustrations of such articles are ice, trees, growing crops, buildings, and the like. A brief resumé of the conditions under which they are real property and those under which they are personalty will best complete our inquiry into the inherent nature of the subject-matter, the law of which is dealt with in this treatise. Those things which are most commonly chattels will be first considered; and the progress of the inquiry will be, in general, towards those that are most frequently real property.

§ 42. **Money.**—Money is never treated as real property, except sometimes in equity under the doctrine of equitable

conversion. By virtue of that doctrine, which rests upon the maxim that "equity regards that as done which ought to be done," real property may be dealt with as personalty, and *vice versa*.¹ If, for example, a testator direct by his will that a certain piece of land be sold and the proceeds paid to a designated person, equity treats that land as personal property from the time of the death of the testator until the sale is actually made;² and when a will orders a sum of money to be invested in real property for the benefit of a person named, such money is regarded by equity as realty from the time of the testator's death.³ So, if real property be sold upon the foreclosure of a mortgage, or by virtue of a judgment, decree, or order of court in a partition suit, or in proceedings for the sale of the lands of infants, lunatics, or other persons incapable of managing their own affairs, the proceeds of the sale, or so much thereof as remains after the mortgage or other liens or encumbrances properly payable therefrom are satisfied, are dealt with in equity as the real property of those whose lands were thus sold.⁴ A contract for the purchase and sale of land causes equity to deal with it as personalty in the hands of the vendor, or his personal representatives in case of his death, and with the purchase price as real property in the hands of the vendee, or his heirs in case of his death.⁵ And when land is taken for public purposes under the exercise of the right of eminent domain, the money paid for the same is realty in so far as it must be so regarded in order to work out the equities of those who had interests or rights in the land.⁶ In all such cases the right of dower, and that of curtesy and all other rights and interests which would be

¹ *Fletcher v. Ashburner*, 1 Bro. C. C. 497; *Bridgeport Elec. & Ice Co. v. Meader*, 30 U. S. App. 581, 588; *Sprague v. Cochran*, 144 N. Y. 104, 112; *Thompson v. Hart*, 169 N. Y. 571; *Ashhurst v. Potter*, 29 N. J. Eq. 625, 643; *Bennett v. Harper*, 36 W. Va. 546.

² *Ibid.*; *Taylor v. Benham*, 46 U. S. (5 How.), 233, 268; *Greenland v. Waddell*, 116 N. Y. 234, 239; *In re Keim's Estate*, 201 Pa. St. 609; *King v. King*, 13 R. I. 501, 506; *Ritch v. Talbot*, 74 Conn. 137.

³ *Seymour v. Freer*, 75 U. S. (8 Wall.) 202, 214; *Fletcher v. Ashburner*, 1 Bro. C. C. 497.

⁴ *Re Barker*, L. R. 17 Ch. Div. 241; *Dunning v. Ocean Nat. Bk.*, 61 N. Y. 497; *Lockman v. Reilly*, 95 N. Y. 64; *Ford v. Livingston*, 140 N. Y. 162; *Oberly v. Lerch*, 18 N. J. Eq. 346; *Lloyd v. Hart*, 2 Pa. St. 473.

⁵ *Palmer v. Morrison*, 104 N. Y. 132; *Williams v. Haddock*, 145 N. Y. 144; *Matter of Davis*, 43 N. Y. App. Div. 331; *Benedict v. Luckenbach*, 162 Pa. St. 18.

⁶ *Kelland v. Fulford*, L. R. 6 Ch. Div. 491; *In re N. Y. & Brooklyn Bridge*, 27 N. Y. Supp. 597; *Citizens' Sav. Bk. v. Mooney*, 26 N. Y. Misc. 67; *Flynn v. Flynn*, 167 Mass. 312; *Wheeler v. Kirkland*, 27 N. J. Eq. 534.

incident to the real property attach to its equitable representative, the money.¹

§ 43. **Stock of a Corporation.** — The interest of an individual stockholder in the property of a corporation or joint-stock association is now uniformly held on both sides of the Atlantic to be personalty, unless it is declared otherwise by positive statute;² and this is true even though the property owned by the corporation consist entirely of realty.³ In a few early English cases, and in one or two decisions following them in this country, it was said that, when the property of the corporation was chiefly land, its shares of stock were also realty.⁴ But practically all such utterances have been discredited and overruled.

§ 44. **Right of Action for Injury to Real Property.** — A right of action for injury to real property is, as a rule, personalty.⁵ If the owner of such injured realty devise it by his will, which takes effect after the right of action accrues, the devisee does not thereby acquire the right to sue, but such right passes as personal property to the executors or administrators of the decedent.⁶ So, if the owner of the injured land sell it without expressly or impliedly transferring the right of action for the trespass, he retains the right to sue the wrongdoer.⁷ But where the trespass is a continuing one, such as that caused by a railroad running over or near the land, the purchaser, devisee, or heir usually acquires the right to sue for the injury occasioned after his acquisition of title; and frequently the contract or deed is so drawn as to transfer to a purchaser of the land the entire chose in action for all the injury caused

¹ Last preceding note.

² *Bradley v. Holdsworth*, 3 M. & W. 422; *Cleveland Trust Co. v. Lander*, 184 U. S. 111; *Matter of Jones*, 172 N. Y. 575; *Tippets v. Walker*, 4 Mass. 595; *Codman v. Winslow*, 10 Mass. 146; *Arnold v. Ruggles*, 1 R. I. 165; *Toll Bridge v. Osborn*, 35 Conn. 7; *Allen v. Pegram*, 16 Iowa, 163; *Southwestern R. Co. v. Thomason*, 40 Ga. 408.

³ *Ibid.*

⁴ *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Weekley v. Weekley*, 2 Younge & C. 281, n; *Welles v. Cowles*, 2 Conn. 567; *Meason's Est.*, 4 Watts (Pa.), 341. Shares in an unincorporated

railroad company were held in Kentucky to be real property which might descend to heirs and in which a widow might have dower. *Price v. Price*, 6 Dana (Ky.), 107. See *Field v. Pierce*, 102 Mass. 253, 261.

⁵ *Griswold v. Met. El. R. Co.*, 122 N. Y. 102; *Mortimer v. Manhattan R. Co.*, 129 N. Y. 81.

⁶ *Griswold v. Met. El. R. Co.*, 122 N. Y. 102; *Shepard v. Manhattan R. Co.*, 117 N. Y. 442; *Gucker v. Met. El. R. Co.*, 38 N. Y. App. Div. 47; *Jones on Easements*, §§ 525-528.

⁷ *Ibid.*; *Ward v. Met. El. R. Co.*, 152 N. Y. 39.

both before and after the title passed to him.¹ If the owner of the land, the value of which is lessened by the existence and operation of a railroad, grant to the railroad company the right to continue the infliction of the injury, which is open and visible, a subsequent purchaser of the land acquires it subject to that right, and cannot sue to restrain its exercise though he has no notice of the grant and the deed is not recorded.² When such a right is sold by the committee of a lunatic, who owns the land, the money obtained for it becomes in equity a part of the real property of the lunatic.³ This results from equitable conversion as above explained.⁴

§ 45. **Gas and Electric Light Fixtures and Appliances.** — The gas pipes which run through the walls and under the floors of a building are a permanent part of the structure. But the brackets and fixtures which appear in the rooms, halls, etc., and can be readily removed from their connections with the pipes without injury to the building, are held by the weight of authority to be mere chattels.⁵ Their character may, however, be controlled by agreement.⁶ And it is held in New Jersey and a few cases in other jurisdictions that, as between vendor and vendee, or mortgagor and mortgagee, but not between landlord and tenant when the tenant made the annexation, all the gas fixtures, gasometers and instruments for generating gas, where they and the pipes constitute one connected plant or system established and maintained on the premises, are all to be taken together as constituting a part of the realty.⁷ Manifestly the same general rules apply to electric light fixtures and appliances as those which determine the character of fixtures used for burning gas. The wires and attachments that are in the walls and floors are ordinarily a part of the house, while the articles that appear

¹ *Mitchell v. Met. El. R. Co.*, 134 N. Y. 11; *N. Y. El. R. Co. v. Fifth Ave. Nat. Bk.*, 135 U. S. 432; *Del. & Rar. Canal Co. v. Wright*, 21 N. J. L. 469; *Fowle v. N. H. & N. R. Co.*, 107 Mass. 352; s. c. 112 Mass. 334.

² *Ward v. Met. El. R. Co.*, 152 N. Y. 39; *Conabec v. N. Y. C. & H. R. Co.*, 156 N. Y. 474; *Lewis v. N. Y. & H. R. Co.*, 162 N. Y. 202.

³ *Ford v. Livingston*, 140 N. Y. 162.

⁴ § 42, *supra*.

⁵ *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; *Towne v. Fiske*, 127 Mass.

125; *Guthrie v. Jones*, 108 Mass. 191; *Nat. Bk. of Catsauqua v. North*, 160 Pa. St. 303; *Copehart v. Foster*, 61 Minn. 132; *Smith v. Commonwealth*, 14 Bush (Ky.), 31; *Rogers v. Crow*, 40 Mo. 91.

⁶ *Fratt v. Whittier*, 58 Cal. 126.

⁷ *Keeler v. Keeler*, 31 N. J. Eq. 181, 191; *St. Louis Radiator Mfg. Co. v. Corroll*, 72 Mo. App. 315; *Sewell v. Augerstein*, 18 L. T. Rep. n. s. 300; *Cent. Trust & Safe Dep. Co. v. Cinn. Grand Hotel*, 26 Weekly Law Bull. 149.

in the rooms and can be readily removed without injury to the building are personal property.¹

§ 46. **Buildings.** — The buildings which a permanent owner of land erects upon it are a part of the realty, unless a different intention is very clearly manifested by him at the time of their erection. This results not only from the maxim *quicquid plantatur solo, solo cedit*, but also from the further well-recognized principle, *cujus est solum ejus est usque ad cælum* in one direction, and *usque ad Orcum* in the other.² Hence dwelling-houses, stables and other outbuildings, fences, and hedges are ordinarily a part of the real property to which they are attached.³ And this is true though the house be made from materials which do not belong to the owner of the land. The landowner is obliged to answer to the former owner of the materials for their value; but by annexing them to his land he has made them his own real property.⁴ After a structure is once so placed upon land as to become a part of it, the structure can not be the subject of conveyance as personalty; nor can it be orally reserved as the personal property of the grantor when the realty is sold. If the grantor wish to reserve the building to himself but to convey the land, he must make such reservation, either in the deed by which the real property is conveyed or by some other writing which complies with the requirements of the statute of frauds relative to the sale of lands, tenements, and hereditaments.⁵ Where, for example, an owner of land upon which stood part of a barn conveyed the land by a deed in which the barn was not mentioned, but it was orally agreed between the parties that it should remain the property of the vendor, it was held that that part of it which stood on the land conveyed passed under the deed to the vendee and constituted a portion of the real property of a subsequent pur-

¹ See *Havens v. West Side Elec. L. Co.*, 17 N. Y. Supp. 580; *Harrisburg Elec. L. Co. v. Goodman*, 129 Pa. St. 206; *Keating I. & M. Co. v. Marshall Elec. L. & P. Co.*, 74 Tex. 605.

² 1 Wash. R. P. p. *1; *Broom's Legal Maxims*, p. *395.

³ *Minshall v. Lloyd*, 2 M. & W. 450; *Wake v. Hall*, L. R. 8 App. Cas. 195; *Mott v. Palmer*, 1 N. Y. 564, 572; *Batterman v. Albright*, 122 N. Y. 484; *Price v. Weehawken Ferry Co.*, 31 N. J. Eq.

31, 34; *Inhab. of Sudbury v. Jones*, 62 Mass. 184, 189.

⁴ *Mitchell v. Stetson*, 61 Mass. 435; 2 Kent's Com. p. *362.

⁵ *Leonard v. Clough*, 133 N. Y. 272; *Noble v. Bosworth*, 19 Pick. (Mass.) 314; *Hussey v. Hefferman*, 143 Mass. 232; *Doane v. Hutchinson*, 40 N. J. Eq. 83; *Sampson v. Camperdown Mills*, 64 Fed. Rep. 939; *Macdonough v. Starbird*, 105 Cal. 65; 63 Alb. Law J. 367.

chaser of the same land who bought with full notice of the oral agreement.¹ Structures that can not be sold, except by contract which complies with the requirements of the statute of frauds relative to transfers of interests in real property, can not be mortgaged or otherwise encumbered by any form of agreement which does not conform to that statute.² At the time when a building is placed upon the land, however, the owner, by clearly indicating his intention, may retain it as personal property. Thus, if he expressly agree with some one else who is interested in it that it shall remain personalty, or mortgage it as a chattel, or build it in such a temporary manner or in such a position as clearly to show that it is not meant to remain on the land, it does not become a part of the freehold, nor does it pass to one who purchases the land with notice of the character of the building or of the agreement by which it is affected.³

§ 47. **Buildings erected on One's Land without his Consent.** — If one person erect a building on the land of another without the express or implied assent of the latter, it becomes at once a part of the land and the property of the landowner. And this is true even though he who builds the house believes that he himself is the owner of the land.⁴ So where one, during the pendency of an action to try the title to land, erected a building thereon with the permission of the defendant in the action, it was held that he could not remove it against the wish of the plaintiff, who prevailed in the suit.⁵ The cases are numerous in which persons who supposed themselves to have perfect title to real property, and in that belief made valuable improvements thereon, have lost both the land and the improvements in suits brought by paramount owners.⁶

¹ *Leonard v. Clough*, 133 N. Y. 292; *Burk v. Hollis*, 98 Mass. 55; *Webster v. Potter*, 105 Mass. 414; *Deane v. Hutchinson*, 40 N. J. Eq. 83; *Bonney v. Foss*, 62 Me. 248.

² See last two preceding notes.

³ *Coleman v. Lewis*, 27 Pa. St. 291; *Morris v. French*, 106 Mass. 326, 329; *Dame v. Dame*, 38 N. H. 429; *Yater v. Mullen*, 24 Ind. 277; *Sheldon v. Edwards*, 35 N. Y. 279; *Leonard v. Clough*, 133 N. Y. 292, 297.

⁴ *Poor v. Oakman*, 104 Mass. 309, 317; *Meriam v. Brown*, 128 Mass. 391; *Bonney v. Foss*, 62 Me. 248; *Spruck v.*

McRoberts, 139 N. Y. 193; *Chandler v. Hamell*, 57 N. Y. App. Div. 305; *McAllaster v. Niagara Fire Ins. Co.*, 156 N. Y. 80; *Leland v. Gasset*, 17 Vt. 403; *West v. Stewart*, 7 Pa. St. 122.

⁵ *Henderson v. Ownby*, 56 Tex. 647. See *Madigan v. McCarthy*, 108 Mass. 376; *Hubschman v. McHenry*, 29 Wis. 655.

⁶ *Bohn v. Hatch*, 133 N. Y. 64; *Sudbury Parish v. Jones*, 8 Cush. (Mass.) 184; *Webster v. Potter*, 105 Mass. 414; *Guernsey v. Wilson*, 134 Mass. 482, 486; *Leland v. Gasset*, 17 Vt. 403; *Reid v. Kirk*, 12 Rich. L. R.

When a structure thus passes to the owner of the land because it is placed thereon without his consent, a court of law will not compel him to make any compensation, to the person who built it, for the materials or labor employed in its erection; and a court of equity ordinarily follows the same rule.¹ He takes the risk of such loss when he builds upon land which he does not certainly know to be his own. It seems, however, that he may move a court of equity to grant him compensation from the landowner for the labor and materials employed, if he who erected the building show that in doing so he acted upon the belief that he had title to the land, which belief had some probable basis, and that the real owner of the property, knowing of such acts and belief, suffered him to go on without notice of the true state of the title.²

§ 48. **Buildings erected on One's Land with his Consent.** — When one person builds on the land of another with the latter's consent, the former may retain the structure as his personal property. When the purpose for which he was permitted to build has been accomplished, or during the temporary holding which he may have of the land, he may remove the structure as his own.³ The consent of the owner of the freehold may be either express or implied. It is usually express when the builder is not given any interest or estate in the land, but simply a license or easement to erect and maintain the building.⁴ It is more commonly implied when he who builds the structure has some temporary interest or

(S. C.) 54; *Campbell v. Roddy*, 44 N. J. Eq. 244; *Crest v. Jack*, 3 Watts (Pa.), 238; *West v. Stewart*, 7 Pa. St. 122; *Graham v. Connellsville R. Co.*, 36 Ind. 463; 2 Kent's Com. pp. *334, *335.

¹ Last three preceding notes. In *McAllaster v. Niagara Fire Ins. Co.*, 156 N. Y. 80, the defendant, which had replaced a burned building by a similar one on the land of the insured but after its proper time to elect to do so under its policy had expired, was compelled to pay the amount of the policy in cash, although the house thus erected by it became at once the property of the insured. Thus, as the result of its wrongfully building on another's land, the company was practically required to pay twice the amount of the policy, — once

in cash and once in the value of the house so rebuilt.

² *Bohn v. Hatch*, 133 N. Y. 64, 68; *Spruck v. McRoberts*, 139 N. Y. 193; *Hardisty v. Richardson*, 44 Md. 617; *King v. Thompson*, 34 U. S. (9 Pet.) 204; 1 Pom. Eq. Juris. § 1241.

³ *Curtis v. Hoyt*, 19 Conn. 154; *Dudley v. Hurst*, 67 Md. 44; *Korbe v. Barbour*, 130 Mass. 255; *Lapham v. Norton*, 71 Me. 83; *Salley v. Robinson*, 96 Me. 474; *Dame v. Dame*, 38 N. H. 429; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Central Branch R. Co. v. Fritz*, 20 Kan. 430.

⁴ *Wall v. Hinds*, 4 Gray (Mass.), 256; *Dame v. Dame*, 38 N. H. 429; *Harris v. Gillingham*, 6 N. H. 9; *Ham v. Kendall*, 111 Mass. 297.

estate in the land, such as an estate for years, from year to year, or for life.¹ In such latter instances the buildings are practically within the domain of fixtures, and their character as realty or personalty is to be determined by the tests applicable to fixtures, as above explained. It follows that when they are erected by a tenant for trade, agricultural (in the United States), or domestic purposes, and are not so constructed that their removal would injure the freehold, he may remove, sell, mortgage, or otherwise encumber them as personal property.² Such rights of those who erect buildings upon the land of others with the landowners' consent, prevail only between the parties to the consent and against those who take interest in the lands with notice of such rights. They are inoperative against innocent purchasers or encumbrancers of the land, without notice, actual or constructive, of the rights of the builders; and as to such purchasers and encumbrancers the erections are real property.³

§ 49. **Rolling-stock of Railroads.** — It is settled that the depots, station-houses, water-tanks, masonry, foundations, columns, substructures, and superstructures of railroads, either surface, underground, or elevated, are real property.⁴ The rails and ties are also commonly treated as realty; but it is held that where they are put down upon a specified part of the roadbed pursuant to a contract that they shall remain personalty in that position until paid for, they do not become real property until payment is made.⁵ As to the character of the rolling-stock of a railroad, there is direct conflict of authority. It is held to be real property by the Supreme Court of the United States and the courts of Kentucky, Illinois, Maine, Maryland, Pennsylvania, and several other states;⁶ while in New York, New Jersey, Iowa, Ohio, Wisconsin, and probably a majority of the states of this country,

¹ Wood v. Hewitt, 8 Q. B. 913; Wiggins Ferry Co. v. O. & M. R. Co., 142 U. S. 396; Doty v. Gorham, 5 Pick. (Mass.) 487; Korbe v. Barbour, 130 Mass. 255; Mechanics' Nat. Bk. v. Stanton, 55 Minn. 211.

² §§ 31-35, *supra*.

³ Kerr v. Kingsbury, 39 Mich. 150; Meyers v. Schemp, 67 Ill. 469; Brown v. Roland, 92 Tex. 54; 2 Bract. 18.

⁴ People *ex rel.* El. R. Co. v. Com. of Taxes, 101 N. Y. 322; Hunt v. Bay State Iron Co., 97 Mass. 279.

⁵ Ibid.; Haven v. Emery, 33 N. H. 66; Pierce v. Emery, 32 N. H. 484.

⁶ Minn. Co. v. St. Paul Co., 69 U. S. (2 Wall.) 609; Hammock v. Loan & Trust Co., 105 U. S. 77; Phillips v. Winslow, 18 B. Mon. (Ky.) 431; Palmer v. Forbes, 23 Ill. 301; Strickland v. Parker, 54 Me. 263; State v. Nor. R. Co., 18 Md. 193; Youngman v. E. & W. R. Co., 65 Pa. St. 278; Coe v. McBrown, 22 Ind. 252.

it is treated as personalty.¹ The questions have most frequently arisen as to whether it should be taxed as realty or personalty, and in connection with the question as to the effect of failure to file as a chattel mortgage a railroad trust deed or mortgage given upon all the property of the corporation.² In answering such questions the better logical reasons appear to be in favor of treating the rolling-stock of a railroad as personal property.³

§ 50. **Water and Ice.**—The water of a stream, lake, or pond forms, while there, a part of the land over which it lies; but, because of its mobile and evanescent character, it can not be dealt with by itself as real property. Thus, a deed of a designated body of water would pass nothing to the grantee. But a deed of a described tract of land covered with water would pass the land and the water on it at the time.⁴ When the water becomes congealed, the ice, as it rests in its natural condition upon the surface, is still a part of the land over which it is formed.⁵ Since, however, it is more stable

¹ *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314; *People, etc. v. Com. of Taxes*, 101 N. Y. 322; *State Treas. v. S. & E. R. Co.*, 28 N. J. L. 21; *Williamson v. N. J. & S. R. Co.*, 29 N. J. Eq. 311; *Neilson v. I. E. R. Co.*, 51 Iowa, 184; *Coe v. C. P. & I. R. Co.*, 10 Ohio St. 372; *Chicago & N. W. R. Co. v. Bor. of Ft. Howard*, 21 Wis. 44; *Meyer v. Johnston*, 53 Ala. 231, 237; *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410.

² Last two preceding notes.

³ *Ibid.* In some states, such as Illinois, Missouri, Arkansas, Nebraska, West Virginia, and Texas, constitutional provisions declare that rolling-stock of a railroad shall be personal property, and liable to execution and sale in the same manner as the personalty of individuals. *Jones on Railroad Securities*, § 171.

⁴ *Co. Lit.* 4 a, b; 2 *Blackst. Com.* p * 18; *Shep. Touchst.* 91. When water, oil, or natural gas is bottled, barrelled, or otherwise separated and retained from the land, it is, of course, personal property. When percolating naturally through the soil, or lying or flowing in bulk upon or within it, these substances are part of the land

upon which they are found for the time being. But when they escape and pass into or upon other land, the former owner's title to them ceases; and they become while there a part of the real property of the owner of the land to which they have passed. Because of the analogy, thus suggested, to the movements and ownership of wild animals, these three substances have been spoken of by the Supreme Court of Pennsylvania as "*minerals feræ naturæ*." *Westmoreland & C. Nat. Gas Co. v. De Witt*, 130 Pa. St. 235. See 5 *Lawy. Rep. Ann.* 731; *People's Gas Co. v. Tyne*, 131 Ind. 277, 408. It is doubtful, however, whether water can be at all properly classified as a mineral; and it is quite certain that the rules and decisions as to mining rights, which bear so directly upon property in oil and natural gas, have no direct application to water, either standing, running, or percolating.

⁵ *Allen v. Weber*, 80 Wis. 531; *Marshall v. Peters*, 12 How. Pr. (N. Y.) 218; *Myer v. Whitaker*, 5 Abb. N. C. (N. Y.) 172; *Paine v. Woods*, 108 Mass. 160; *Washington Ice Co. v. Shortall*, 101 Ill. 46; *Bigelow v. Shaw*, 65 Mich. 341.

than water, the landowner may treat it in this condition as personal property, and may sell, mortgage, or otherwise deal with it as such. He may dispose of the soil and ice together as real property, and a transfer of the land without mentioning the ice will have that effect; or he may dispose of the land and reserve the ice as personalty, either in the deed or by an oral reservation; or he may, it seems, dispose of the ice while in its natural condition on the surface as personal property.¹ After the ice has been cut and severed from the water, it is personalty, and can be dealt with only as such.² In all of these respects ice partakes of the nature of an annual crop formed upon the surface of the water. It is *prima facie* a portion of the land over which it is made, but, either before or after it is cut, it may be dealt with by its owner as personalty; and it must be so treated after it has been severed from the land.³

As between the state and the individual owners of land along the banks of streams, lakes, or ponds, the question of the ownership of the water and ice is ordinarily answered by determining who owns the land under the water. Along a non-navigable stream each riparian proprietor owns to the thread of the stream, while the bed, ice, and water of navigable streams belong to the state.⁴ This follows the uniform *criterion*; but, as to what streams are navigable in contemplation of law and what are not, the common law is not so well settled in this country, with its large rivers actually navigable far above tide-water, as it is in England, with its short streams navigable only so far as the tide ebbs and flows. In England, a stream in which the tide does not ebb and flow is uniformly treated as non-navigable, and the riparian proprietors own to the *filum aquæ*.⁵ In some of the United States, such as Iowa, Kansas, Missouri, Michigan, Pennsyl-

¹ *Huntington v. Asher*, 96 N. Y. 604; *Van Rensselaer v. Mould*, 48 Hun (N. Y.), 396; *Higgins v. Kusterer*, 41 Mich. 318; *Eidmiller Co. v. Guthrie*, 42 Neb. 238; 21 Amer. Law Reg. n. s. 320; 32 Amer. Law Reg. n. s. 66; 48 Alb. Law J. 504.

² *Ward v. People*, 3 Hill (N. Y.), 395, 6 Hill (N. Y.), 144. See *Washington Ice Co. v. Shortall*, 101 Ill. 46; *State v. Pottmeyer*, 33 Ind. 402.

³ Last three preceding notes.

⁴ *Shively v. Bowlby*, 152 U. S. 1, 31; *Smith v. City of Rochester*, 92 N. Y. 463; *Gouverneur v. Nat. Ice Co.*, 134 N. Y. 355; *Paine v. Woods*, 108 Mass. 160, 172; *Bigelow v. Shaw*, 65 Mich. 341; *Marsh v. McNider*, 88 Iowa, 390.

⁵ *Bickett v. Morris*, L. R. 1 Sc. App. 47; *Orr Ewing v. Colquhoun*, L. R. 2 App. Cas. 839; *Barney v. Keokuk*, 94 U. S. 324, 337; *Shively v. Bowlby*, 152 U. S. 1, 31.

vania, North Carolina, and several other states, the soil under the large rivers, which are in fact navigable but not subjected to the ebb and flow of the tide, is held to belong to the state;¹ and the Supreme Court of the United States has decided that those rivers which form boundaries between states, and are used or may be used for purposes of commerce, are navigable rivers of the United States, and this, too, without regard to the consideration whether or not the tide ebbs and flows within them.² The states around the Great Lakes, and not the individual riparian owners, have title to their beds and water.³ In New York it is held that, except as to streams regulated by statute, the English common-law *criterion* is applicable to streams in general, but that the Hudson and Mohawk rivers are governed by the rule of the civil law, according to which the riparian owners do not hold the bed of the stream even where there is no tide.⁴

Ice formed upon a stream, lake, or pond the bed of which belongs to the state is the property of the public in general, and may be cut and removed by the one who first appropriates it and cuts, or surveys and fences it off as his.⁵ But, when one has taken possession of a portion and appropriated it to himself, the rights of others are excluded.⁶ (a)

§ 51. **Vegetable Products of the Earth — Fructus Industriales — Fructus Naturales.** — Things which belong to the vegetable kingdom are either *fructus naturales*, the natural, sponta-

(a) It is provided by statute in New York that each riparian owner along the Hudson River may cut and remove the ice opposite his land, as far as the *filum aquæ*, provided he erect safeguards to prevent accidents to travellers and teams as required by the statute. N. Y. L. 1895, ch. 953.

¹ Houghton v. Chicago R. Co., 47 Iowa, 370; Wood v. Fowler, 26 Kan. 682; Benson v. Morrow, 61 Mo. 345; Ryan v. Brown, 18 Mich. 196, Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. (Pa.) 71; Cuson v. Blazer, 2 Binn. (Pa.) 475, 477; Wilson v. Forbes, 2 Dev. L. (N. C.) 30; Shively v. Bowlby, 152 U. S. 1, 31.

² Shively v. Bowlby, 152 U. S. 1, 58; Water Power Co. v. Water Comm'rs, 168 U. S. 349; Swerigan v. St. Louis, 185 U. S. 38.

³ Lincoln v. Davis, 53 Mich. 375; Ill. Cent. R. Co. v. Illinois, 146 U. S. 387.

⁴ Smith v. City of Rochester, 92 N. Y. 463, 473; People v. Canal Apprais-

ers, 33 N. Y. 461; Neal v. City of Rochester, 156 N. Y. 213; Lincoln v. Davis, 53 Mich. 375.

⁵ Ibid.; Paine v. Woods, 108 Mass. 160; Gage v. Steinkrauss, 131 Mass. 222; People's Ice Co. v. Davenport, 149 Mass. 322; Barrett v. Rockport Ice Co., 84 Me. 155; Wood v. Fowler, 26 Kan. 682; Rossmiller v. State, 114 Wis. 169; Woodman v. Pitman, 79 Mo. 456; Brookville & M. H. Co. v. Butler, 91 Ind. 134; Becker v. Hall, 88 N. W. Rep. 324 (Iowa); Bigelow v. Shaw, 65 Mich. 341. See Washington Ice Co. v. Shortall, 101 Ill. 46; Mill River W. Mfg. Co. v. Smith, 34 Conn. 462.

⁶ Ibid.

neous productions of the earth which do not require annual cultivation; or *fructus industriales*, fruits which are the result of yearly culture. Since the former are the more closely and permanently connected with the soil and appear more really to be a part of it, they are more frequently treated as real property than are the latter.¹ Each of these classes requires brief consideration.

§ 52. **Fructus Industriales.**—These include not only those crops which require the yearly sowing of seed, such as corn, potatoes, beans, peas, and the like, but also those which are produced by vines or shrubs springing up anew each year from old roots but needing training and culture in order to the production of valuable fruit.² Types of the latter kinds of products are hops, requiring as they do that the vines shall be trained upon poles or other supports and cultivated in order that a crop may result,³ and turpentine, which, though taken from trees, yet requires annual care and culture for its production.⁴ Nursery trees also are practically *fructus industriales*, since care and training by man are necessary to their production in a form suitable for market.⁵ It is sometimes difficult in individual cases to decide what products of the soil are *fructus industriales*; but it may be stated in general that they include all fruits and crops which need annual sowing, or cultivation, or training, or care by man, in order to the production of any substantial, valuable result. Things are not to be placed in this class simply because by cultivation a *better* crop will be produced. Thus, blackberries and strawberries are not *fructus industriales*; for the vines or bushes will produce valuable crops from year to year without man's care, although training and culture may cause them to bring forth larger and better fruits.⁶

The common law treats these annual products of the soil (*fructus industriales*) as part of the realty, unless they are so dealt with by the owner of the land or the character of the

¹ Matter of Chamberlain, 140 N. Y. 390; Sparrow v. Pond, 49 Minn. 412; Brittain v. McKay, 1 Ired. L. (N. C.) 265; Preston v. Ryan, 45 Mich. 174.

² Co. Lit. 55 b, n., 364; Williams, on Exr's, 597; Lewis v. McNatt, 65 N. C. 63; State v. Moore, 11 Ired. L. (N. C.) 70; Penton v. Robert, 2 East, 88; Forbes v. Shattuck, 22 Barb. (N. Y.) 568; Chaplin, Landl. & T. ch. xxi.

³ Latham v. Atwood, Cro. Car. 515; Rodwell v. Phillips, 9 M. & W. 501; 2 Blackst. Com. p. * 122.

⁴ Lewis v. McNatt, 65 N. C. 63.

⁵ Penton v. Robert, 2 East, 88; Price v. Brayton, 19 Iowa, 309.

⁶ Sparrow v. Pond, 49 Minn. 412; Matter of Chamberlain, 140 N. Y. 390; Kimball v. Sattley, 55 Vt. 285.

ownership is such as to indicate that they are personal property.¹ Hence, if the landowner grant or devise it without mentioning the crops that are growing upon it, they pass to the grantee or devisee.² And when an ancestor dies intestate, although the annual crops standing upon his land whether then ready for harvest or not belong primarily to his personal representatives, this is only for the purpose of paying his debts; and if not needed to satisfy his creditors they pass with the land to his heirs, unless it is otherwise provided by statute.³ (a) Even though the crops are mature, but have not yet been severed from the land, they are generally treated as *prima facie* a part of the real property.⁴ But in this condition the courts have more readily regarded them as personalty, against the claim of the heirs, and in some instances against that of devisees.⁵

While a few early cases held that a conveyance of the land upon which stood annual crops necessarily included

(a) In a number of the American states this is regulated by statute. The law of New York is as follows: "The following shall be deemed assets and go to the executors and administrators, to be applied and distributed as part of the personal property of the testator or intestate, and be included in the inventory; . . . 5. The crops growing on the land of the deceased at the time of his death. 6. Every kind of produce raised annually by labor and cultivation, except growing grass and fruit ungathered." N. Y. Code Civ. Pro. § 2712; *Batterman v. Albright*, 122 N. Y. 484; *Matter of Chamberlain*, 140 N. Y. 390.

¹ Last preceding note; *Branton v. Griffiths*, L. R. 1 C. P. Div. 349; *Bradner v. Faulkner*, 34 N. Y. 347; *Howell v. Schenck*, 24 N. J. L. 89; *Smith v. Price*, 39 Ill. 28.

² *Falmouth v. Thomas*, 1 Cr. & M. 89; *Vaughan v. Hancock*, 3 C. B. 766; *Batterman v. Albright*, 122 N. Y. 484, 488; *Banta v. Merchant*, 173 N. Y. 292; *Wintermute v. Light*, 46 Barb. (N. Y.) 278, 283; *Bradner v. Faulkner*, 34 N. Y. 347; *Dennett v. Hopkinson*, 63 Me. 350; *Bull v. Griswold*, 19 Ill. 631; *Cummings v. Newell*, 86 Minn. 130; *Willis v. Moore*, 59 Tex. 628.

³ *Kain v. Fisher*, 6 N. Y. 597; *Batterman v. Albright*, 122 N. Y. 484, 488; *Stall v. Wilbur*, 77 N. Y. 158; *Howe v. Bachelder*, 49 N. H. 204; *Penhallow v. Dwight*, 7 Mass. 34; *Pattison's Appeal*, 61 Pa. St. 294; *Broom's Legal Maxims*, p. *305; 2 *Woerner Adm.* § 282.

⁴ Thus a crop of corn standing unharvested in the field in December was held to have passed to the grantee of the land. *Tripp v. Hasseig*, 20 Mich. 254, 261. See *Parker v. Strickland*, 11 East, 362; *Kittredge v. Woods*, 3 N. H. 503. A crop growing on land when it is sold on execution passes with the land. *Hersberg v. Metzgar*, 90 Pa. St. 217; *Pitts v. Hendrix*, 6 Ga. 452; *Porche v. Bodin*, 28 La. An. 761. And the same is true as to a sale on foreclosure or in partition. *Ledyard v. Phillips*, 47 Mich. 305; *Jones v. Thomas*, 8 Blackf. (Ind.) 428. But see *Albin v. Riegel*, 40 Ohio St. 339.

⁵ Last three preceding notes; *Penhallow v. Dwight*, 7 Mass. 34; *Sherman v. Willett*, 42 N. Y. 146; *Howe v. Bachelder*, 49 N. H. 204; *McGee v. Walker*, 106 Mich. 521.

them unless they were expressly excepted in the deed,¹ yet the great weight of authority is now in favor of permitting an oral reservation of the crops, without violating the statutes of frauds. The owner may treat them, even before they are severed from the soil as personal property, and may orally reserve them to himself or transfer them to another by any method which complies with the requirements of the section of the statute of frauds relating to personalty.² So they may be taken on execution as personal property; and a mortgage of them as chattels generally gives to the mortgagee an ownership of them superior to the rights of subsequent purchasers or encumbrancers of the land.³ After the crop is severed from the soil, even though not yet removed from the land on which it grew, it is uniformly treated as personal property, and does not pass with a conveyance of the land unless the grantor act in such a manner as to preclude himself from denying the vendee's right to the crop.⁴

Again, the character of the ownership of the land by him who claims the annual crops may be such as to cause them to be treated as part of his personal property. This is true of such products raised by a tenant for years, at will, or for life, while the tenancy continues;⁵ and where the holding is for an uncertain period, such as that of a life tenant or tenant at will, the right to cultivate and harvest the crops which are the result of his annual labor ordinarily belongs to the tenant as to such crops which are growing upon the land when the

¹ See *Emmerson v. Heelis*, 2 Taunt. 38; *Sainsbury v. Matthews*, 4 M. & W. 345; *West v. Moore*, 8 East, 339.

² *Sexton v. Breese*, 135 N. Y. 387, 391; *Stall v. Wilbur*, 77 N. Y. 158; *Pattison's Appeal*, 61 Pa. St. 294; *Owens v. Lewis*, 46 Ind. 488; *Kelley v. Goodwin*, 95 Me. 538; *Howe v. Bachelder*, 49 N. H. 204; *M. V. L. Co. v. Barwick*, 50 Kan. 57; *Polley v. Johnson*, 52 Kan. 478; *Overman v. Sasser*, 10 Lawy. Rep. Ann. 722 and note. Where the owner of a mortgaged farm sells a crop of wheat growing thereon, and then before it is harvested delivers possession of the land to the mortgagee, the mortgage debt not yet being due, the purchaser of the crop as such owns it in preference to the claims of the mortgagee of the land. *Sexton v. Breese*, 135 N. Y. 387.

³ *Whipple v. Foote*, 2 Johns. (N. Y.) 418; *Fry v. Miller*, 45 Pa. St. 441; *Wait v. Baldwin*, 60 Mich. 622.

⁴ *Dixon v. Niccolls*, 39 Ill. 372; *Hersberg v. Metzgar*, 90 Pa. St. 217; *Stockwell v. Phelps*, 34 N. Y. 363; *Faulcon v. Johnston*, 102 N. C. 264.

⁵ Co. Lit. 55; *Oland's Case*, 5 Co. Rep. 116 a; *Whipple v. Foote*, 2 Johns. (N. Y.) 418; *Stewart v. Doughty*, 9 Johns. (N. Y.) 108; *Harris v. Frink*, 49 N. Y. 24, 30; *Batterman v. Albright*, 122 N. Y. 484, 490; *Kelley v. Goodwin*, 95 Me. 538; *Johnson v. Camp*, 51 Ill. 219, 220. But the crops may readily become a part of the realty, if the tenant voluntarily abandon or forfeit the land. *Ibid.*; *Chandler v. Thurston*, 10 Pick. (Mass.) 205, 210; *Debow v. Colfax*, 10 N. J. L. 128.

tenancy terminates.¹ This right of a tenant for an uncertain period to his away-going crops is to be more fully treated of hereafter under the head of emblements.

§ 53. **Fructus Naturales.** — These are trees and their fruits, shrubs and grasses, which come to perfection without needing labor or intervention by man. Under most circumstances they are a part of the land upon which they are standing, and pass with it by grant, devise, or descent.² They are so closely allied, in contemplation of law, to the soil itself that, while standing as they have grown upon it, they can not be transferred by oral contract; but the conveyance must comply with the requirements of that part of the statute of frauds which relates To the sale of lands, tenements, or hereditaments, or any interest therein.³ (a) It has been held in New York and some of the other American states, that, if standing trees be sold by written contract so that the purchaser owns them distinct from the soil, they may be regarded as personal property in his hands and transferred or otherwise dealt with as such. His purchase of them, without including any of the soil in which they are rooted, works a constructive severance of them from the land. He must buy them as real property from the owner of both soil and trees; but after so buying he may own them as a portion of his personalty.⁴

(a) It is to be again noted that section 2712 N. Y. Code Civ. Pro. declares that "every kind of produce raised annually by labor and cultivation" is to be part of the personal assets of a deceased person, "*except growing grass and fruit ungathered.*" Note (a), p. 61, *supra*. It is thus made clear that, even though fruits such as apples, peaches, pears, etc., or such grasses as clover or sedge, may be carefully cultivated, and so improved in quality or increased in quantity, they are, while still standing uncut in the field or hanging ungathered upon the trees, a part of the real property of the deceased owner of the land. *Matter of Chamberlain*, 140 N. Y. 390.

¹ *Kittredge v. Woods*, 3 N. H. 503; *Whitmarsh v. Cutting*, 10 Johns. (N. Y.) 360; *Termes de la Ley*, "Emblements." See *Reeder v. Sayre*, 70 N. Y. 180, 184, 185.

² *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149; *Matter of Chamberlain*, 140 N. Y. 390; *Batterman v. Albright*, 122 N. Y. 484; *Hutchins v. King*, 68 U. S. (1 Wall.) 53; *Sparrow v. Pond*, 49 Minn. 412; *Slocum v. Seymour*, 36 N. J. L. 138; *White v. Foster*, 102 Mass. 375.

³ *Carrington v. Roots*, 2 M. & W. 248; *Green v. Armstrong*, 1 Denio (N. Y.), 550; *McGregor v. Brown*, 10 N. Y. 114; *Howe v. Bachelder*, 49 N. H. 204; *Brackett v. Goddard*, 54 Me. 309; *Whitmarsh v. Walker*, 42 Mass. 313; *Buck v. Pickwell*, 27 Vt. 157; *Walton v. Lowry*, 74 Miss. 484.

⁴ *Lansingburgh Bk. v. Cray*, 1 Barb. (N. Y.) 542; *Warren v. Leland*, 2 Barb. (N. Y.) 613; *Clafin v. Carpenter*, 4 Met. (Mass.) 580; *Kingsley v. Holbrook*, 45 N. H. 313; *McClintock's Appeal*, 71

A sale of standing trees or grass, which results in the immediate passing of the title, must be carefully distinguished from a contract for their future sale and delivery. Such a contract may be made orally, when it provides for their severance by the vendor and delivery to the vendee;¹ while, if under its provisions they are to be cut by the vendee, the contract is unenforceable unless it is in writing.² The latter form of the contract contemplates the passing of the title while they are still connected with the soil, and therefore is an agreement for the sale of an interest in land. In the case, however, where the vendor is to sever them from the ground, the sale is not to be consummated and the title is not to pass until they have become personal property by reason of such severance, and it is therefore a sale of that kind of property.³

A sale of standing trees or grass, which results in an immediate passing of the title, must also be carefully distinguished from a mere license given by the owner to another to come upon the land and cut and remove them. Such a license, though given orally, as it usually is, is a complete justification to him who acts upon it and removes the grass or trees.⁴ But it gives to him no ownership of or enforceable

Pa. St. 365. The courts of England and those of some of the United States have distinguished between a sale of trees when the sap is out of them and they are to be cut and removed by the vendee before it returns (or when they are sold, for their immediate removal by the vendee, so that they are not to receive any further sustenance from the soil), and a sale of them to be owned by the vendee while standing with the sap in them and to receive further nourishment from the soil before their removal. They have held that in the former case the purchaser owns them as personal property, and may even buy them as such if he do so when there is no sap in them, while in the latter case it is a sale of real property, and they remain realty in his hands or in the hands of those claiming under him so long as they continue to draw sustenance from the ground. This distinction, making the character of the trees depend on whether or not they are to receive further nutriment from the soil, is logically correct

but often difficult of application, and it has been practically discarded in the United States. *Ibid.*; *Liford's Case*, 11 Coke, 46 b; *White v. Foster*, 102 Mass. 375; last three preceding notes.

¹ *Bostwick v. Leach*, 3 Day (Conn.), 476, 484; *Killmore v. Howlett*, 48 N. Y. 569; *St. Regis Paper Co. v. S. C. Lumber Co.*, 173 N. Y. 149; *White v. Foster*, 102 Mass. 375; *Marshall v. Green*, L. R. 1 C. P. Div. 35.

² P. 62, note 2, *supra*.

³ P. 62, note 4, *supra*.

⁴ See "license," discussed § 240, *infra*, as an excuse when executed for what would otherwise have been a trespass. Some courts hold that as soon as the trees are cut pursuant to a license, though not yet removed from the land, they become the personal property of the licensee, and the license to remove them is then irrevocable. *Nettleton v. Sykes*, 8 Met. (Mass.) 34; *Leonard v. Medford*, 85 Md. 666; *Cool v. B. & L. Co.*, 87 Ind. 531; *Bostwick v. Leach*, 3 Day (Conn.) 476.

interest in them until they have been severed from the ground. Before such severance the landowner may revoke the license and prevent the licensee from going upon the land; while, if the transaction had resulted in a valid sale of the grass or trees, the vendor would have lost all control over them.¹

Trees cut or blown down and lying upon the land where they grew, or grass severed from the ground but still lying upon it, will pass with a transfer of the land when there are no circumstances to indicate a contrary intent.² But in these conditions they may also be treated as personal property, in the same manner as *fructus industriales*.³ And when they have been removed from the land upon which they grew, or the trees have been sawed or hewn into timber or cut or piled up in such a way as to indicate a permanent severance from the soil, they become personalty.⁴

As was above pointed out, trees planted and cultivated as nursery products and designed to be sold and transplanted while yet young are in reality *fructus industriales*, and are governed by the principles of law applicable to annual crops. Nursery trees are often treated by text-writers as fixtures; but they are uniformly personal property, if the owner choose to so regard them, and it will be found that the courts have constantly applied to them the rules of law which control fruits of yearly cultivation.⁵

Standing trees being ordinarily real property, it is settled that, if the trunk of a tree be wholly on one man's land while the roots extend into another's soil and the branches overhang it, the entire tree and all its fruits, if any, belong to the owner of the land on which the trunk stands.⁶ The adjacent owner, however, may lop off the branches and roots at the dividing line between the two lots of land.⁷ When, on the other hand, the trunk of a tree stands partly on one man's

¹ Last preceding note.

² *Brckett v. Goddard*, 54 Me. 309; *Kittredge v. Woods*, 3 N. H. 503; *Cook v. Whiting*, 16 Ill. 480.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Batterman v. Albright*, 122 N. Y. 484, 489; *Price v. Brayton*, 19 Iowa, 309. It has been held, however, that nursery trees planted by the owner of the land become part of the realty, as security under a mortgage of the land

which was given before the planting of the trees. *Maples v. Millon*, 31 Conn. 598; *Adams v. Beadle*, 47 Iowa, 439; *Brooks v. Galster*, 51 Barb. (N. Y.) 196; *Miller v. Baker*, 1 Met. (Mass.) 27.

⁶ *Masters v. Pollie*, 2 Rolle, 141, 144; *Hoffman v. Armstrong*, 48 N. Y. 201; *Lyman v. Hale*, 11 Conn. 177; *Skinner v. Wilder*, 38 Vt. 115.

⁷ *Ibid.*; *Lemmon v. Webb* (1894), 3 Ch. Div. 1; *Grandona v. Lovdal*, 70 Cal. 161.

land and partly on another's, the dividing line between the lots passing through the trunk whether at its middle or not, the entire tree and its fruits belong to the two landowners as tenants in common.¹

§ 54. **Manure.**—Manure made upon a farm, from the consumption of its products and in the ordinary manner, is regarded, either as between vendor and vendee, mortgagor and mortgagee, or landlord and tenant, as a part of the real property. And this is generally true of both the manure itself and of composts formed of its mixture with hay, straw, soil, or other substances, and whether it or they be found where the manure is dropped or gathered into heaps or piles or moved to different parts of the farm.² It has been held, however, that, when raked into heaps for the purpose of being removed from the farm and sold, manure is to be treated as personalty;³ while, if so gathered for the purpose of being carted to another part of the same farm and used there, it remains a part of the land.⁴ The reason for the general rule is that, since the substance of the land produces the manure, it should remain on the farm for its enrichment, and the soil should not be impoverished because of its removal by a vendor or outgoing tenant.⁵ But this reasoning is repudiated in New Jersey, North Carolina, and New Brunswick, in all of which jurisdictions manure is ordinarily held to be personal property.⁶

When the food from which the manure is produced is not raised on the land upon which it is dropped by the animals, the reason for treating it as a part of the realty does not exist,

¹ *Dubois v. Beaver*, 25 N. Y. 123; *Griffin v. Bixby*, 12 N. H. 454. And neither owner can legally destroy or injure the tree without the consent of the other. *Ibid.*; *Waterman v. Soper*, 1 Ld. Raym. 737; *Skinner v. Wilder*, 38 Vt. 115. See *Robinson v. Clapp*, 65 Conn. 365.

² *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Goodrich v. Jones*, 2 Hill (N. Y.), 142; *Elting v. Palen*, 60 Hun (N. Y.), 306; *Lewis v. Lyman*, 22 Pick. (Mass.) 437; *Kittredge v. Woods*, 3 N. H. 503; *Perry v. Carr*, 44 N. H. 118; *Chase v. Wingate*, 68 Me. 204; *Norton v. Craig*, 68 Me. 275; *Wetherbee v. Ellison*, 19 Vt. 379; *Strong v. Doyle*, 110 Mass. 92.

³ *Leigh v. Hewitt*, 4 East, 154; *French v. Freeman*, 43 Vt. 93; *Strong v. Doyle*, 110 Mass. 92; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169. And, of course, its character as realty or personalty may be controlled by custom or agreement. *Webb v. Plummer*, 2 B. & Ald. 746; *Fletcher v. Herring*, 112 Mass. 382; *Hill v. De Rochemont*, 48 N. H. 87.

⁴ Last two preceding notes.

⁵ *Ibid.*

⁶ *Ruckman v. Outwater*, 28 N. J. L. 581; *Smithwick v. Ellison*, 2 Ired. L. (N. C.) 326; *Staples v. Emery*, 7 Me. 201; 1 Wash. R. P. p. *6.

and it is accordingly held to be personal property. Thus, where a tenant of a farm fed his cattle upon grain produced from a source foreign to the land, he was entitled during his term to remove it from the farm.¹ And where the owner of a stable in which he kept team horses sold it together with the house and small yard around them, it was held that a quantity of manure in the cellar of the stable did not pass to the vendee, but remained the personal property of the vendor.² So, manure dropped in the street is the personal property of the first taker.³

Manure, while still where it was dropped on the land from the products of which it was made, may be treated as personality by the landowner and transferred or encumbered as such. He may, accordingly, dispose of it by any contract which complies with the statute of frauds as to sales of personality, and a subsequent conveyance of the farm will not pass the manure to the vendee under the deed. It is thus capable of being constructively separated from the land by oral contract, in the same manner as ice and annual crops.⁴

§ 55. **Pew Rights.**—In England, the freehold of church property is in the parson for the time being. The pewholder has a right to occupy the pew during divine services, and this is an incorporeal right in the nature of an easement in the lands of another.⁵ When it is granted to one in perpetuity or for life, his ownership of it is real property; but when it is simply leased to him for one or more years, his interest in it is personal property, — a chattel real.⁶ In this country, in the absence of statutory provisions, the same statements apply

¹ *Gallagher v. Shipley*, 24 Md. 418; *Snow v. Perkins*, 68 Md. 483; *Pickering v. Moore*, 33 Atl. Rep. 828 (N. H.). But the fact that a tenant furnished to his live-stock some hay and grass not raised on the premises will not give him any title to the manure made, especially if he fail to specify how much of either he supplied, and what proportion they bore to the entire amount of food consumed by the live-stock. *Lewis v. Jones*, 17 Pa. St. 262, 267.

² *Proctor v. Gilson*, 48 N. H. 62.

³ *Haslem v. Lockwood*, 37 Conn. 500.

⁴ *French v. Freeman*, 13 Vt. 93; *Collier v. Jenks*, 19 R. I. 137; *Strong*

v. Doyle, 110 Mass. 92; *Ewell on Fixtures*, p. 122; *Tyler on Fixtures*, pp. 352-356.

⁵ *Brumfitt v. Roberts*, 5 C. P. 224, 232; *Phillips v. Haliday* (1891), App. Cas. 228; *Shaw v. Beveridge*, 3 Hill (N. Y.), 26; *Daniel v. Wood*, 18 Mass. 102.

⁶ *McNabb v. Pond*, 4 Bradf. (N. Y.) 7; *Johnson v. Corbett*, 11 Paige (N. Y.), 265, 276. *French v. The Old South Society*, 106 Mass. 479. When an interest in any kind of realty is for a term of years only, that interest is a mere chattel real, — personality. See § 73, *infra*.

as to the nature of the pewholder's rights and ownership;¹ but the determination of where the title to the church grounds and edifice resides depends on the character and organization of the church society. In some of the states, statutes declare pews in churches to be personal property; while in other states they are thus made real property.² In either case, the rights of the owner of the pew do not include the privilege of occupying or using it at any time except during divine services, or for any other purposes than those connected in some way with public worship.³

The church society or organization has such a vital interest in the character and personnel of its pewholders, in the uses to which the pew is to be put and in the compensation to be paid for the same, that it is generally permitted, without any of the restrictions of technical rules of law, to treat the terms of the deed or contract as the sole *criterion* of the nature and extent of the estate, rights, and duties of the owner of a pew. Thus, if a deed conveying an acre of land in fee simple should contain a clause purporting to restrict absolutely the right of the grantee to alien the same, such clause

¹ *Freligh v. Platt*, 5 Cow. (N. Y.) 494; *Ithaca Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Woodworth v. Payne*, 74 N. Y. 196, 200; *Sohier v. Trinity Church*, 109 Mass. 1, 21; *Aylward v. O'Brien*, 160 Mass. 118; *State v. Trinity Church*, 45 N. J. L. 230; *Barnard v. Whipple*, 29 Vt. 401. In *Shaw v. Beveridge*, 3 Hill (N. Y.), 26, 27, the court said, per Nelson, Ch. J.: "But in this state owners of pews have an exclusive right to their possession and occupation for the purposes of public worship; not as an easement, but by virtue of their individual rights of property therein, derived perhaps, in theory at least, from the corporation represented by the trustees who are seised and possessed of the temporalities of the church." But the right is uniformly treated as substantially an easement. And its owner may have an action of trespass against any one who wrongfully interferes with the right. *Ibid.*; *Voorhees v. Presby. Ch.*, 17 Barb. (N. Y.) 108; *St. Paul's Ch. v. Ford*, 34 Barb. (N. Y.) 16; *French v. The Old South Society*, 106 Mass. 479.

² See *Jackson v. Rounseville*, 46 Mass. 127; *O'Hear v. De Goesbriand*, 33 Vt. 593; *Church v. Wells' Executors*, 24 Pa. St. 249; Mass. Rev. L. 1902, ch. 36, § 38; *Aylward v. O'Brien*, 160 Mass. 118.

³ *Brumfitt v. Roberts*, 5 C. P. 224; *Erwin v. Hurd*, 13 Abb. N. C. (N. Y.) 91; *First Bapt. Soc. v. Grant*, 59 Me. 245; *Presby. Ch. in Newark v. Andruss*, 21 N. J. L. 325. At meetings for temporal purposes, but such as have some bearing directly or indirectly upon the management or interests of the church, it would seem that the owner of a pew has the exclusive right to sit therein. *Wall v. Lee*, 34 N. Y. 141, 149; *First Baptist Church of Hartford v. Wetherell*, 3 Paige (N. Y.), 296. But when the use of the edifice for the time being is wholly foreign to the business or affairs of the church, — as when it is leased for purposes not connected with the public worship of the church society, — the pewholder has no such exclusive right. *Jackson v. Rounseville*, 46 Mass. 127, 132.

would be null and void:¹ but, in the conveyance of a pew, whether in fee simple, for life, or for years, such a restriction is valid and enforceable.² So the contract is the only thing ordinarily to be consulted in determining the power of the society to tax the holder of the pew and otherwise to demand compensation for its use.³

So long as the church authorities do not act wantonly or maliciously against the holder of a pew, he can not prevent any alterations, repairs, or even removal or taking down of the building by them.⁴ He can not compel the holding of divine services in the structure, nor prevent the society from abandoning it as a place of worship.⁵ If the building be destroyed by fire or other casualty, or become so dilapidated that it must be taken down, he has no right to compensation for the loss of his pew.⁶ If, however, a pew be taken away when it is not reasonably necessary to do so, the owner may recover proper compensation.⁷ So, alterations must be made with a just regard to the relative rights of the holders of the pews; and if in the course of alterations or repairs a pew be placed in a position relatively less advantageous than that which it formerly occupied, the owner may recover compensation for his loss.⁸

§ 56. **Burial Rights.**—The right of sepulture is governed by substantially the same legal principles as are pew rights, except that the former are rarely granted otherwise than in perpetuity. The cemetery society, or other organization for burial purposes, usually retains the ownership of the soil, while the owner of the burial plot or right has an easement as real property, or a license, to bury there so long as the ground

¹ See discussion of the rule which prevents a grantor in fee simple from restricting the right of alienation by his grantee, §§ 280, 282, *infra*.

² *French v. The Old South Society*, 106 Mass. 479. See 22 Lawy. Rep. Ann. 206; *Aylward v. O'Brien*, 160 Mass. 118.

³ *Gifford v. First Presby. Soc. of Syracuse*, 56 Barb. (N. Y.) 114; *Bapt. Church v. Witherell*, 3 Paige (N. Y.), 296; *German Ref. Church v. Seibert*, 3 Pa. St. 282, 291; *Chase v. Cheney*, 58 Ill. 509.

⁴ *Howe v. Stevens*, 47 Vt. 262; *Heeney v. St. Peter's Church*, 2 Edw.

Ch. (N. Y.) 608; *Aylward v. O'Brien*, 160 Mass. 118.

⁵ *Freligh v. Platt*, 5 Cow. (N. Y.) 494; *Matter of Ref. Dutch Church*, 16 Barb. (N. Y.) 237; *Van Houten v. First Ref. Dutch Church*, 17 N. J. Eq. 126.

⁶ *Ibid.*; *Voorhees v. Presby. Church*, 8 Barb. (N. Y.) 135; *Re Brick Presby. Church*, 3 Edw. Ch. (N. Y.) 155; *Kincaid's Appeal*, 66 Pa. St. 411; *Jones v. Towne*, 58 N. H. 462.

⁷ *Voorhees v. Presby. Church*, 17 Barb. (N. Y.) 108; *Sohier v. Trinity Church*, 109 Mass. 1, 21; *Aylward v. O'Brien*, 160 Mass. 118.

⁸ *Ibid.*

is used for burial purposes. The deed or contract in this case also is treated as practically the sole *criterion* of the relative rights and duties of the parties.¹ The owner of the burial lot or privilege holds it subject to municipal control and police regulations, and to the right of the society, so long as it acts in good faith, to abandon it as a burial ground. The right granted is also revocable whenever such a course is required by public necessity.² It is to be added, as a matter of course, that when a cemetery association sells the *land* to the various purchasers of the lots, each purchaser acquires the corporeal real property by his deed and holds it subject to the rules and regulations of the society. But it is more customary for the society to convey an easement or a license, as above explained, and retain to itself the title to the land.

§ 57. **Heirlooms.**—In the English law, articles, which in their inherent nature are personal property, sometimes become so associated by custom with ancestral houses or structures as necessarily to descend with them, as part of the real property, to the heir. These are called heirlooms. They are generally such implements or articles of furniture as can not be removed without practically dismembering the inheritance. Illustrations are, old family pictures and jewels, fish in a pond, jewels of the crown, maps, charts, and other evidences of the inheritance, and the like.³

Heirlooms, in this accurate sense, have never been recognized by the law of this country, unless perhaps title deeds passing with the land may be so treated.⁴ But the same term is sometimes used loosely and inaccurately to denote articles which remain personalty but by act of the parties have been retained in the same family for a number of generations. Heirlooms as recognized in England are always real prop-

¹ *Windt v. German Ref. Church*, 4 Sand. Ch. (N. Y.) 471; *Craig v. First Presby. Church*, 88 Pa. St. 42; *Sohier v. Trinity Church*, 109 Mass. 1, 21.

² *Ibid.*; *Kincaid's Appeal*, 66 Pa. St. 411; *Dwenger v. Geary*, 113 Ind. 106, 113; *Hollmann v. Platteville*, 101 Wis. 94; *B. L. & I. Co. v. Jenkins*, 111 Ala. 135.

³ *Liford's Case*, 11 Co. Rep. 46 b, 50; *Ford v. Tynte*, 2 Johns. & H. 150; *Shelley v. Shelley*, 37 L. J. Ch. 357; *Lord v. Wardle*, 3 Bing. N. C. 680; *Pusey v. Pusey*, 1 Vern. 273; *In re*

Lord Chesham, L. R. 31 Ch. Div. 466; 2 Blackst. Com. pp. *18, *428; *Shep. Touchst.* p. *470. See *Tollemache v. Earl of Coventry*, 2 Cl. & F. 611; *Hill v. Hill* (1902), 1 Ch. 807.

⁴ Title deeds ordinarily pass with the land and belong to its owner, and are not property in and of themselves; but it would not be safe to say that they have been distinctively treated as heirlooms in this country. See *Parrett v. Avery*, 159 Mass. 594; *Huse v. Den*, 85 Cal. 390; *Smith v. McGregor*, 10 Ohio St. 461, 473; 48 Alb. Law Jour. 514.

erty — hereditaments. As will be explained hereafter, they afford the best illustration of hereditaments which are not tenements.¹

The general nature of real property having been explained, and the circumstances under which various classes of articles are to be embraced within it having been examined, the way is now cleared for the discussion of the rules and principles of law that have been built upon and around it by the wisdom of the centuries.

¹ See § 62, *infra*.

CHAPTER IV.

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§ 58. **Four Departments of Real-property Law — Kinds — Holdings — Estates — Titles.** — The discussion of real property and the law relating to it naturally divides itself into four leading departments. The first of these is an explanation of the different *kinds* of real property — lands, tenements, and hereditaments. The second deals with the *holdings* of real property, and in doing so brings to light many of the historical reasons at the foundation of great legal principles. The third discusses the *estates* or interests that may be owned in lands, tenements, or hereditaments. And the last explains the *titles* by which real property may be acquired and held. A preliminary outline of each of these branches of our subject will be of interest and assistance to the student.

I. *Kinds of Real Property.*

§ 59. **Lands — Tenements — Hereditaments.** — The historical consideration of the common-law divisions of property shows that, during the vigorous sway of the feudal system, things which were objects of ownership were either goods and chattels, or lands, tenements, and hereditaments; and that, after that system had lost most of its pristine vigor, they were either real property or personal property. It thus appears that real property consists of lands, tenements, and hereditaments.

§ 60. **I. Land,** which is the least comprehensive of these three terms, embraces all real property that is substantial and tangible. It comprehends the soil of the earth and the permanent productions and erections upon it, as trees, houses, fences, poles, wires, and other structures. It includes all the *strata* of the soil and the space downward to the centre of the earth, as well as all the space and structures above the surface indefinitely outward. If one own an acre on the surface of the soil, his land is ordinarily embraced within a cone or pyramid, having the centre of the earth as its apex, extending upward and outward indefinitely into space, with its sides passing through the edges of the plot marked out by the acre upon the surface of the soil. The sides or *superficies* of this cone constitute his *close*, for the wrongful breaking through of

which by another the common law gives to the owner of the land an action of trespass *quare clausum fregit*.¹

§ 61. II. **Tenements** is a word of broader signification than land. It denotes all property of which feudal tenure could be predicated, i. e. which one as vassal could hold of another as lord. It includes land and also mere incorporeal rights, such as franchises, rents, ways, and other easements and servitudes, — practically every species of real property known to the American law, whether tangible or intangible. It is in the fact that tenement embraces these incorporeal kinds of property that its distinction from land is to be emphasized. Including these and all lands also, it is frequently and quite accurately used as a *generic* word to denote real property of every description.²

§ 62. III. **Hereditament** (*heir-editement*) is any property capable of being inherited — anything that can be transmitted by the law of descent from ancestor to *heir*. It is said by Coke and Blackstone to be the largest and most comprehensive of the three words, land, tenement, hereditament.³ It embraces lands and substantially all tenements, and also some things which are neither lands nor tenements, such as heirlooms. Since, however, heirlooms are not recognized in this country, and they are the only things which in England are really hereditaments and not tenements,⁴ it follows that the word "hereditament" has no broader scope in the United States than the word "tenement." It is possible, moreover, in

¹ See 3 Blackst. Com. ch. xii.

² "Thus *liberum tenementum*, frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like: and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements." 2 Blackst. Com. p. *17.

³ Chase's Blackst. p. 219.

⁴ Mr. Blackstone says (2 Blackst. Com. 17): "And so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament." By a condition he means the right sometimes reserved by a grantor of land to re-enter and take it back from the grantee or any one claiming under him,

if a certain stipulation or restriction contained in the deed be violated by such grantee or any such claimant. When the land is conveyed in fee simple, with such restriction, the right to recover it back if the restriction be broken is called a possibility of forfeiture (or possibility of reverter). This may descend to the heirs of the grantor, but it can not be assigned or devised, nor held one of another. In the law of this country it is the nearest approach to a hereditament that is not a tenement; but it is not, strictly speaking, either of these, since it is not property. It is a mere chance or possibility, which may pass to the heirs of the grantor, not as heirs, but by way of representation. *Upington v. Corrigan*, 151 N. Y. 143.

either country, to create a tenement that shall not be a hereditament. Thus, if A grant to B a right of way over A's land, to continue during B's life only, such right or easement is a tenement; but it is not a hereditament, since it must terminate at B's death and therefore can not descend to his heirs.

There are two kinds of hereditaments: 1. Corporeal; and 2. Incorporeal. 1. Corporeal are such as are tangible or cognizable by the senses and are the same as land as above defined. 2. Incorporeal hereditaments are *rights*, neither tangible nor visible, nor otherwise cognizable by the senses, which arise out of a thing corporeal, or are concerned with, or annexed to, or exercisable within corporeal property.¹ Such are a right of one person to pass over the land of another, or to drain water across another's lot, the right to build or maintain a ferry, bridge, or road, and the right to collect compensation for the use of leased premises.

There are four kinds of incorporeal hereditaments, which are important in American law. These are, (1) rent, (2) franchise, (3) easement, (4) *profit à prendre*. Six other kinds are recognized and dealt with by the English law, namely: advowsons, tithes, offices, dignities, corodies or pensions and annuities; but, with the exception of the last, these things are not known in this country, and the law of annuities belongs rather to a work on wills or contracts than to one on real property. (1) Rent is defined as the right to a certain profit issuing periodically out of lands or tenements. A familiar example is the right which the landlord has to collect from his tenant compensation for the use of the leased premises. (2) A franchise is a special right or privilege conferred by the government upon one or more individuals, such as does

¹ "In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled; incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament,

we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them." (2 Blackst. Com. p. *20). A rent, for example, is an incorporeal hereditament, because it is merely the *right* to periodic compensation for the use of leased property. The money, or other valuable compensation which the tenant pays, is not, in legal contemplation, the rent, but merely the proceeds, profits, or returns which the rent produces. See § 100, *infra*.

not belong generally to the citizens of the country. Thus, a ferry right, a bridge right, or the right to build and operate a railroad or to be a corporation is a franchise. (3) An easement has been well defined as "a privilege without profit" (i. e. without *profit à prendre*, or the right to take anything from the land), "which the owner of one piece of land called the dominant tenement has over another piece of land called the servient tenement." An example of this large and important class of incorporeal hereditaments is a right of way, or the privilege of maintaining a drain, which one owner of land has over the land of another. It is essential to the existence of an easement, as thus defined, that there shall be two distinct tenements—a dominant and a servient. But there are also many similar rights with which the law of real property has to deal, and in which there is only one tenement involved—the servient. Such are rights in streets, wharves, or parks, or privileges which individuals *as such* may have over land of others. These latter, although frequently called easements, are perhaps more properly designated by the general, civil-law term *servitudes*, which, as commonly employed, embraces all easements as well as all other forms of rights owned by one person over the land of another. (4) A *profit à prendre* is the right of one individual to take something of value from the land of another. Illustrations are a mining right, a right to cut and remove timber, and the privilege of grazing cattle upon the fields of others. These rights are often designated as commons; but the latter word is a narrower old English term, which is not much used in the United States. They are all included within the generic term *servitudes*.

A license, which is an authority to do some act or acts upon the land of another without possessing any estate or interest therein, is so similiar to incorporeal hereditaments, especially to easements, that its treatment logically and properly follows that of those other intangible rights. A mere license, although it is generally a complete justification for any act done pursuant to its terms and while it remains operative, does not give to its owner any right which is enforceable against the will of the landowner. The latter may generally revoke it, at any time before its execution is complete. It is, moreover, most commonly made by parol, while easements and other servitudes are created by grant, or prescription, or methods equally strong and binding.

II. *Holdings of Real Property.*

§ 63. **Kinds of Holdings.**—The ample control, which the owner of real property may now have over it, is the result of long and gradual development. Absolute ownership of land, except by the king, was unknown to the feudal law. Hedged about originally by the most refined and cumbersome restrictions, the subject who possessed realty has laboriously, and step by step, made his way towards an independent ownership, until, in England to-day, little but the theory of tenure remains. By *tenure* from some superior lord, however, is still the manner of holding land, in the mother country, by every one except the king. In the United States, the advance towards unrestricted ownership and control has been much greater. There is no tenure of land here; but the owner is said to have it by an *alodial* holding; that is, there is no recognition of any superior lord or over-master under whom he retains his possession or control. The two methods of holding real property, then, are, I. Alodial holding in this country; II. By tenure in England.

§ 64. **I. Alodial Holding.**—Protection by the state must be back of all adequate and satisfactory enjoyment of property of any kind. That protection is reasonably accompanied by some rights and interests in the property, which are reserved to the state. Such are the right of taxation, the right to take property when needed for public purposes, — or eminent domain, — and the right of escheat, which gives the title of property to the state when its owner dies intestate and without heirs or without heirs by whom it can be inherited. Real property held alodially is owned subject to such rights of the state, but free and independent of all other domination or control. Its owner has it in substantially the same way in which he has his watch or horse.

§ 65. **II. Tenure.**—The feudal system gave birth and nurture to very many of the leading principles, which now help to make up the law of real property on both sides of the Atlantic. Most of these originally clustered around the idea of tenure, or the holding of land by one person, as vassal or tenant, of another as lord. As terse illustrations of this fact, it may be stated that the subtle idea of seisin, the leading distinctions between the kinds of estates or interests which may be owned in real property, the development of the right

to transfer those interests from one to another, and the methods and forms by which such transfers are made, especially the unfolding of a warranty and its effects on alienation *inter vivos*, were all directly produced or largely modified by the existence of feudal tenure. These are fully discussed hereafter. But it will conduce to clearness to explain here that the important word "seisin" embraces not only the thought of *possession*, or right of possession, of real property, but also that of a claim of a *freehold estate* therein — an estate either for life or that may descend to the owner's heirs. Thus, seisin in fact is the actual possession of realty, coupled with a claim of a freehold estate therein; and seisin in law is the *right* to the possession of, and the ownership of, a freehold estate in real property which no one else is holding adversely. A life owner, or an owner in fee, of land, who has possession, is seised in fact; an heir, who has inherited vacant land of which he has not yet taken possession, is seised in law; but a tenant for years, since his estate is less than one for life, has only possession and not seisin.

The most ancient and honorable English tenure was that by 1, *Knight-service*. It was purely military in character, and required from the vassal, as compensation for his retention of the land, attendance upon the lord and services for him in the wars. These services were regarded as honorable and free (i. e., worthy of a free man) and they were originally uncertain in amount. He who held by this species of tenure was said to have a *proper feud*; and all other kinds of tenure gave rise to so-called *improper feuds*.

As wars became less exacting and the acts of peace more plentiful, tenure by knight-service gradually abated. The most important of those holdings that succeeded it is that which is still the prevailing modern English tenure, — 2, In *free and common socage*. The services which it requires from the tenant are still regarded as free and honorable; but they are fixed and definite in amount and consist in the return of money or its equivalent to the lord, rather than in military exploits. Some of the land in the United States was held by this form of tenure before the revolution.¹

There have existed three other more important forms of English tenure. One of these is that in 3, *Villein-socage* (origi-

¹ See *Delancey v. Piepgras*, 138 N. Y. 26; *Gray*, Rule against Perpetuities, §§ 22-28.

nally *ancient demesne*), in which the services or returns rendered by the vassal to the lord are fixed and certain in amount, but base, servile, or menial in character. Another was tenure in 4, *Pure villeinage*, in which the services were base or servile and unlimited in amount, — measured only by the reasonable ability and endurance of the tenant, — a species of landed slavery now, of course, no longer employed. And the third is tenure by 5, *Copyhold*, a form still in existence, which arose out of pure villeinage and in which the tenant, once either in his own person or in that of his ancestor a slave or villein, but subsequently emancipated and thus enabled to contract with his lord and to contend with him in the courts, may prove his interest and rights in the land by a *copy* of the record or court roll formerly kept in the old manor court, or court baron, of the manor in which the land is situated.

A word as to the inferior or subsidiary species of tenure will be sufficient in this brief outline. They were tenure by 6, *Frankalmoin*, in which the services were religious in character but not fixed in amount; by 7, *Divine service*, requiring certain and prescribed religious duties; by 8, *Grand sergeanty*, in which the vassal rendered some special, personal service for the king; by 9, *Petty sergeanty*, which required the yearly rendering to the king of some article for his personal use in war, as a lance or a bow; by 10, *Burgage*, small holdings in the ancient boroughs by a certain rent; and by 11, *Gavelkind* by which the Kentish men held their lands under special, favorable customs. It will be seen, from the fuller discussion hereafter, that some of these — and especially *frankalmoin* — while classed with the lesser tenures, throw much clear light on the growth of feuds and on the abiding principles which feuds matured.

III. *Estates in Real Property.*

§ 66. **Classes of Estates.** — An estate is the interest which one has in lands, tenements, or hereditaments. This is to be carefully noted as something entirely distinct, not only from the lands, tenements, or hereditaments themselves, but also from the methods of holding them and from the titles by which they may be acquired or held. Thus, an acre of land may be held by A as vassal of B, the right to thus hold having been conveyed to A by C and being expressly made to continue during A's life only. The interest, or ownership

which A has in the land, to continue during his life, is his *estate* in that land; his title or means of acquiring the estate is through C; he holds it subject to the feudal rights of B; and thus the four conceptions — land, holding, *estate*, title — stand out distinct. Again, A, the owner of land, may create over it a perpetual right of way, which he grants to X and Y jointly for twenty years, and after that time to Z and his heirs forever. The right of way is a tenement, X and Y have a joint *estate* in that tenement for twenty years, Z has an *estate* to begin in possession after twenty years and last perpetually, and the title, or means of acquiring these different *estates* or interests in the one tenement, is derived from A, the common grantor.¹ The law of personal property has comparatively very little to do with estates. This is owing to the fact that, because of the temporary and perishable character of personality, the ownership or interest in it is usually absolute and entire, and hence does not call for particular discussion apart from the title. But, since real property is ordinarily permanent and has been through all the ages the object of careful study and refined distinctions, estates in it have been made, classified, divided and subdivided until the rules and principles relating to them in their numerous aspects have come to form, perhaps, the most important branch of the law of real property.

The classifications of estates are from five distinct standpoints; namely: I. With reference to the courts by which they are recognized — their legal or equitable nature; II. With reference to their quantity — the extent or duration of the interest; III. With reference to the number and connection of their owners; IV. With reference to their conditional or

¹ The word *estate*, as here employed in its technical and proper sense, is also to be carefully distinguished from the meaning frequently ascribed to it by popular usage. In this latter sense it very commonly signifies the property generally which a person owns. Thus, a man is often said to have left a large or a small estate at his death, or to have lost all of his estate in speculation; and executors, administrators, and trustees are constantly spoken of as representing the estates of decedents. In this loose, special, or popular sense of the word, *estate* is synonymous with

the word *property*. In the technical sense of the law of real property, *estate* is one's *interest* in the property or object of ownership. This distinction between the two senses of the word may be made clearer by the following example: If A own a thousand acres of land during his life and B own one acre of the same kind of land in fee simple (i. e., for him and his heirs forever), while A has the greater estate, in the loose sense of the greater quantity of property, yet B has the greater estate, in the accurate, technical sense of real property law.

qualified nature; V. With reference to the time when the enjoyment of them may begin — whether the owner may have the possession or income of the property at present, or must wait for it till some future time. A brief outline here of these classes and divisions will prepare the way for the more exhaustive discussion of subsequent chapters.

§ 67. I. Estates classified with Reference to the Courts by which they are recognized — Their Legal or Equitable Nature. — Before the court of chancery took any cognizance of real property, or of rights or interests therein, the only final arbiter as to the creation, transfer and devolution of these was the court of law. Hence, the estates which the latter sanctioned and controlled were called *legal* estates; and they are still described by the same expression. They comprise, of course, the larger part of the interests that are owned in real property. But the desire, and in a large sense the necessity, of having a right or ownership in realty distinct from these legal estates — an interest which the law courts long refused to recognize, but which was to be owned and controlled by one person while the legal estate resided in another — afterwards gave rise to a *use* and a *trust*, both of which were recognized and fostered by the courts of equity. This was accomplished, for example, by giving land to A for the use of B, or in trust for B. A then held the legal estate and was regarded by the law courts as the absolute owner of the land; while B came, in time, to be treated by the courts of equity as owning the *equitable* estate and, for all substantial purposes, as the sole owner of the property. When A held thus for B generally, while B was to manage and control the land for himself, A was said to hold for the use of B, and B owned a *use*. When, on the other hand, A held the property specially, actively to manage and control it for the benefit of B and to hand over to him the net proceeds, he was said to hold in trust for B, and B owned a *trust*. These two equitable estates — the use and the trust — as viewed from the standpoint of their owner, may be collectively defined as the right to the beneficial enjoyment of property of which the legal estate is in another person. A third form of the equitable estates is the so-called *equity of redemption*, in those jurisdictions in which a mortgage of real property transfers the legal estate or interest to the mortgagee. In most of the United States, a mortgage of land is now merely a lien upon it, and the mortgagor retains the legal estate. But

in England and a few of our states, such as Massachusetts and New Hampshire, the legal interest passes to the mortgagee, while the right to redeem the land, at and after the maturity of the debt, has been perfected and preserved by equity for the mortgagor and constitutes his equitable estate. In summary, then, from this point of view, all estates are either 1, Legal, or 2, Equitable; and the equitable estates are: (1) uses; (2) trusts; and (3) equities of redemption.

§ 68. (1) **Uses.** — After its invention in early feudal times and prior to the twenty-seventh year of the reign of Henry VIII., the use was the prominent form of equitable ownership. The holder of the legal estate was designated the feoffee to uses, and the owner of the equitable interest (the use) the *cestui que use*. The former was a mere receptacle for the legal title and estates; while the latter had all the management, control, and benefit of the property. The *cestui que use* had these, moreover, divested of most of the duties, responsibilities, and burdens that ordinarily attach to the ownership of property. His interest could not be reached by his creditors, nor forfeited for his crimes, nor made subject to the claims of a wife, husband, or feudal lord. The courts of equity had favored this estate too strongly, in failing to give it such incidents so requisite to the fair and proper employment of land for business and commercial purposes; and one result of this failure was a number of attempts to remedy the evils by means of legislation. These culminated in the celebrated "Statute of Uses," 27 Hen. VIII. ch. 10, by which it was enacted, in substance, that, whenever one person was seised of a legal estate for the use of another, the owner of the use (the *cestui que use*) should have also the legal estate in the same quality, manner, form, and condition in which he had the use. By a strained construction of that statute, however, its purpose was frustrated; and the use, slightly altered in the method of its creation and with most of the ordinary property incidents, duties, and burdens now attached to it, has been retained as an equitable estate distinct from the legal, but under the generally employed new appellation of a *passive express trust*.

§ 69. (2) **Trusts.** — Trusts, including their original types which existed as such before the Statute of Uses and the old use with its new name, are now the most important of the equitable estates. It will suffice, in this outline, to explain

briefly the nature of the chief classes into which they are divided.

Trusts, in respect to the mode of their creation, are primarily divided into two classes : *a*, Express, and *b*, Implied. They are express when they are explicitly declared by the instrument or agreement, or appear from a proper construction of its terms; implied when raised by equity, either to effectuate what is assumed to be the intention of the parties, or to work out justice regardless of what may have been the intent.¹

a. Express trusts, as here defined, include such as are ordinarily called *precatory*, i. e., trusts not declared by direct words of command, but indicated — most commonly in a will — by expressions of hope, request, entreaty, recommendation, and the like, used in such manner as reasonably to evince the testator's intent that the devisee shall hold or dispose of some or all of the property for another. All of the express trusts are subdivided into two classes; viz. (*a*) active, and (*b*) passive. (*b*) A passive express trust is simply the old use with its new name, as above explained; while a trust is (*a*) active when the trustee has some active duties to perform for the *cestui que trust*, as, for example, to manage the property and pay the net proceeds over to him. Within the general sphere of the express trusts are also included, not only those that are private and for definite beneficiaries, but also those called public or *charitable*, the distinguishing characteristics of which are that their object is some public utility, their individual beneficiaries are indefinite, and they may be validly made to continue forever. It is to be added that quite similar to an express trust is an arrangement by which a duty to dispose of realty is imposed on one to whom the legal estate is not transferred. This creates a power in trust. And such powers are properly to be discussed in connection with the general topic of express trusts.

b. Implied trusts are either (*a*) resulting or (*b*) constructive. A resulting trust is one which equity raises in order to carry out what is assumed to be the intention of the parties. A constructive trust is one implied by equity in order to work out justice, regardless of what may have been the intent of the

¹ Unfortunately, the use, by one or two prominent writers, of divisions different from these that are commonly employed, has tended to breed confusion

in regard to the exact limitations of the terms "express trusts" and "implied trusts." See 1 Perry on Trusts, §§ 24-27, 112; § 35, *infra*.

parties. A brief statement as to each of these will explain its essential nature and forms.

(a) Resulting trusts are of four kinds. One of these commonly arises when, in one transaction, real property is bought in the name of one person and the purchase price as such is paid by another. He who takes the legal title and estate ordinarily holds the land in trust for him who thus pays the consideration. A second form exists when a holder of trust funds purchases realty with them and takes title in his own name; a third when real property is conveyed "in trust," but the trusts are not wholly declared or partly or entirely fail; and a fourth, in some instances, though not so readily to-day as in former times, when a conveyance of land is made by a deed which expresses no consideration nor any use or purpose for which the grantee is to hold. In all such instances, the holder of the legal estate is a trustee for the owner of the fund, or the grantor, or those who have succeeded to his interest by descent or otherwise.

(b) Constructive trusts arise either from actual fraud — circumstances of imposition — or from fraud presumed by equity though not actually proved, or from transactions in which there is no fraud, but in which the raising and enforcing of a trust affords the most adequate and complete remedy. Thus there are three subdivisions of this important branch of trusts. An instance of the first of these exists where one by acts of imposition or unfair dealing obtains a legal estate from another, so that the latter might have an action at law in tort for the wrong. In equity, he may have a constructive trust in the property declared against the wrongdoer, and a reconveyance to himself decreed. Again, when a trustee of real property purchases it from the *cestui que trust*, equity *presumes* fraud and, unless the purchaser overcome this presumption by positive evidence of fairness, raises a constructive trust against him. In such cases, equity goes far beyond law, which never presumes fraud, and furnishes illustrations of the second class of constructive trusts. And lastly, as illustrating the third class of such trusts, when a valid contract is made for the purchase and sale of real property, the intended vendor becomes at once a trustee of the property for the intended vendee, and the latter is treated as holding the purchase money in trust for the former, not because of any fraud either actual or presumed, nor because the parties are

regarded as so intending, but because upon this principle of a trust the best remedy — usually a specific performance suit — is available to either party if the other fail to carry out the contract.

§ 70. (3) **Equities of Redemption.** — In the original form of a mortgage the legal estate was always transferred to the mortgagee. If the debt secured by the mortgage were not promptly paid on the day when it was due — the “law day” — the title and estate became absolute in the lender, and the mortgagor could not subsequently regain the land. In the process of ameliorating this hardship on the borrower, equity gave to him the so-called “equity of redemption,” — the right to redeem the land and regain it for himself, by paying the principal of the debt, interest, and costs in full *after* the law day. This right has been so greatly enlarged in most of the states of this country that it has been merged into a legal estate now retained by the mortgagor until foreclosure of the mortgage is complete. But in England and Massachusetts, for examples, the changes have not been so great; and, as was above explained, the equity of redemption remains in the mortgagor or his successors in interest until the mortgage is paid off or otherwise discharged or foreclosure of it is complete.

§ 71. **II. Estates classified with Reference to their Quantity, or the Extent or Duration of the Interest in them.** — In this respect the primary division of estates is into, 1, *Estates of freehold* and 2, *Estates less than freehold*. For the purpose of this brief outline, it is sufficient to define a freehold estate as one which is either a life estate or a greater interest. Thus, the following estates, namely: to A for his own life, to A during the life of B, to A and the heirs of his body, to A and his heirs so long as they continue to live upon the land, to A and his heirs forever, are all freehold estates. Such interests were regarded by the courts, in feudal times, as the only ones worthy of a free man’s contemplation and acceptance; only a free man could hold such estates, and hence the name which was applied to them. An estate less than freehold is one which, in contemplation of law, is not so great or important as a life estate. Illustrations of them are, an estate to A for ten years (or for any number of years or other interval measured by a definite period of time), and to A at the will of himself and his landlord or during the will of

either of them. Such interests were regarded as trivial and unimportant and not worthy of being owned by a free man.

§ 72. 1. **Freehold Estates** are either (1) Estates of inheritance, or (2) Estates not of inheritance. (1) An estate of inheritance is one capable of descending from ancestor to heir by the law of descent. Such are the estates in fee, these being again subdivided into *a*, Fee simple, and *b*, Qualified fees.

a. An estate in fee simple is the highest and most comprehensive interest known to the law — an estate to *one and his heirs forever*. The owner of it has absolute dominion and control of the property, so that he may sell it in perpetuity, devise it away absolutely by his will, or let it descend to his heirs generally upon his death.

b. Qualified fees are also estates to one and his heirs, but there is appended some condition, qualification, or restriction, such that the owner may not have the absolute, perpetual dominion of the property. The subdivisions of this class are: (a) Fee conditional at common law, which by the statute *de donis conditionalibus*¹ became the fee tail; (b) Fee on condition; (c) Fee on limitation; and (d) Fee on conditional limitation. (a) A fee conditional at common law, which by the ancient statute *de donis conditionalibus*² was converted into the fee tail (or estate tail), is an estate to one and the heirs of his body or some part or class of such heirs; i. e., while the conveyance is in a sense to him and his heirs, so that the estate is a fee, yet the words employed restrict the inheritance to his own issue, or some part of them, and exclude other relatives. Illustrations are, an estate to *X and the heirs of his body*; to *X and the heirs of his body by his wife Mary*; to *X and the heirs male or female of his body*. (b) A fee on condition is an estate to one and his heirs, but conveyed to him with words of conditional or hypothetical import, such that the estate is to be defeated and the property revert to the grantor, deviser, or other person who conveyed it, or his heirs, if the condition be broken by the happening of the contingent event, and he who conveyed the estate or his heirs re-enter. An illustration is an estate to *X and his heirs, provided they do not sell intoxicating liquor upon the premises*. If they sell such liquor there,

¹ See next succeeding note.

² 13 Edw. I. stat. 1, ch. 1, § 2 (A. D. 1285). The provisions, operation, and

effects of this famous statute are explained in § 281, *infra*.

and he who conveyed the estate or his heirs re-enter upon the property, the estate of X is thereby defeated. (c) A fee on limitation is an estate to one and his heirs, but conveyed to him by the use of words denoting duration of time, as "while," "during," "so long as," etc. (any expression that is a translation of *donec*); such that, when the limitation thus indicated expires by the happening of the contingent event, the estate will terminate and the property revert to the grantor, or other person who conveyed, or his heirs, without the necessity for their re-entry. An illustration is an estate to X and his heirs, *so long as they do not sell intoxicating liquor upon the premises*. If they sell such liquor there, the estate of X at once terminates and the property reverts to him who conveyed it, or to his heirs. (d) A fee on conditional limitation is an estate to one and his heirs, but conveyed by the use of words of either condition or limitation, and with the provision that on the happening of the contingent event the estate shall depart from the person to whom it is first conveyed and go over to another. An illustration is either an estate to X and his heirs, *but if they sell intoxicating liquor upon the premises then to Y and his heirs*, or an estate to X and his heirs *until they sell intoxicating liquor upon the premises and then to Y and his heirs*. If X or his heirs or successor in interest sell such liquor there, the estate at once passes to Y or his heirs, without the necessity for any entry upon the premises by the latter. The fee on conditional limitation was not permitted to be made directly by a deed at common law; but, after wills of real property were authorized by statute, such an estate could be made by will as one of the forms of executory devises; and, by the employment of a use, it could be made indirectly by deed as a shifting use. These methods of creating and dealing with it are fully explained hereafter.

(2) Freehold estates not of inheritance are the life estates. These are classified, according to the manner in which they are created, into *a*, Conventional life estates, or those made by act, contract, or convention of the parties; and *b*, Legal life estates, or those made by operation of law. *a*. The conventional life estates comprise: (a) An estate to one for his own life, illustrated by an estate to X *so long as he lives*; (b) An estate *per autre vie*, i. e., to one person during the life of another, illustrated by an estate to X *so long as Y lives*; and (c) An estate for an uncertain period, which is not at will

and may last for life, illustrated by an estate to X *so long as a designated tree shall stand* or an estate to Y *while she remains a widow*. Of these three forms, the estate *per autre vie* is regarded as the smallest; and it has always been treated as the least of all the freehold interests. b. The legal life estates are: (a) Curtesy, — the life interest of a husband in all the real property of which his wife was beneficially seised of an estate of inheritance during the coverture, provided a child be naturally born of the marriage, born alive and capable of inheriting the property; (b) Dower, — the life interest of a wife in one third of the real property of which her husband was beneficially seised of an estate of inheritance during the coverture; (c) Jointure, — a provision or settlement of property by or for a husband upon his wife, to be taken by her in lieu of dower; and (d) Estates by marriage, such as the husband's common-law interest in and right to income from his wife's real property of any kind during the coverture. It will be noted that all of the legal life estates arise from the relationship of husband and wife. They have always been favored by the common-law courts.

§ 73. 2. **Estates less than Freehold** embrace four classes, namely: (1) Estates for years; (2) Estates from year to year, including those from month to month, from week to week, from day to day, etc.; (3) Estates at will; (4) Estates at sufferance. (1) An estate for years is one which is measured by some definite period of time, whether it be one hour, ten days, twenty years, or ten millions of years. All estates so measured have precisely the same standing before the common law; all are governed by the same principles and each of them, whether its period of time be great or small, is of lesser importance and a lesser estate in contemplation of law than a life estate which is the least of the freeholds. Estates for years are *chattels real*. (2) When a tenant has held real property for a year or more, paying rent according to a yearly reckoning, and after such time has elapsed he remains in possession without further contract, he may ordinarily be treated by the landlord as tenant for another year; and if he remain after that year he may be treated as tenant for another year, and so on from year to year; and such a proceeding creates for him by implication of law an estate from year to year. When a tenant pays rent regularly every month, without any contract as to how long he shall remain

as a tenant and without any yearly reckoning in the transaction, he becomes by implication of law a tenant from month to month; while, if such payments be weekly, the tenancy becomes from week to week; and thus estates from month to month, from week to week, from day to day, etc., are caused to arise. (3) An estate at will is one created by contract, express or implied, whereby landlord and tenant agree that the latter shall hold the real property as tenant, either at the will of both parties (which is the most common form of such tenancy), or at the will of one of them only who is designated in the contract. The party at whose will the estate is so held may terminate it, whenever he elects to do so, without the consent of the other. This is the least of all the estates that rest upon contract either express or implied. (4) An estate at sufferance is one which arises from the wrongful¹ holding over and remaining in possession by a tenant who came rightfully upon the land. It is not the result of contract, but merely of the *laches* or forbearance of the landlord in not ejecting the tenant after the expiration of his rightful tenancy. This is the lowest and most insignificant of *all* the estates. The tenant at sufferance differs from a trespasser merely in the fact that his original coming upon the land was rightful, while a trespasser is a wrongdoer from the beginning. The estates from year to year, at will and at sufferance are *chattel interests*.²

§ 74. III. Estates classified with Reference to the Number and Connection of their Owners. — The classes of estates, which arise from a consideration of the ways in which a number of persons may together own real property, are 1, *Estate in severalty*, and 2, *Joint estates*; and the latter are (1) Estate in joint tenancy; (2) Estate in coparcenary; (3) Estate in common; (4) Estate by the entirety; (5) Partnership estates, and (6) Estates or interests in joint mortgages.

§ 75. 1. An Estate (or a Tenancy) in Severalty exists when one has the right to enjoy real property separately and dis-

¹ "Wrongful" here means simply without any right founded on contract or other legal act. It does not necessarily include the thought of any moral turpitude. Any holding over by a tenant, without legal right, is wrongful.

² The practical distinction, made in some states, between chattels real

(estates for years) and chattel interests, is that the former may be reached by an execution while the latter can not be so reached. See N. Y. L. 1896, ch. 547, § 23; Fowler's Real Prop. L. of N. Y., p. 117; 1 Stimson's Amer. Stat. L. § 1344.

inct from the interests of others. It is the most natural and common of all these classes of estates.

§ 76. 2. **Joint Estates.** — (1) **An Estate in Joint Tenancy** is one held or owned together by two or more persons in equal shares by purchase. The owners are said to be seised *per my et per tout* — that is, each owns an undivided share equal to that of each of the others, and also each owns the whole. From this theory or fiction of entire ownership by every joint tenant flows the great distinguishing characteristic of this estate, the right of *survivorship*; by which is meant that, whatever be the quantity of estate, and even though it be limited to the owners and their heirs, the survivor or survivors take the entire estate to the exclusion of the heirs or representatives of their deceased co-owners. Joint tenants must acquire their interests by purchase (i. e. any method other than by descent from a deceased ancestor), at the same time, from the same source, and so that their individual interests are the same in amount; and, when one of them is in possession of the property, they are all deemed by the law to be in possession. These requisites are ordinarily expressed by saying that a joint estate has the *four unities* of time, title, interest, and possession.

§ 77. (2) **An Estate or Tenancy in Coparcenary** arises, in England, when, upon the death of an ancestor, his real property descends to two or more female heirs. There is no survivorship in this kind of tenancy. It has the three unities of title, interest, and possession, but not that of time. It is not now recognized in any of the United States; for in such cases of descent the land is held by the heirs as tenants in common.¹

§ 78. (3) **An Estate (or a Tenancy) in Common** exists when undivided interests are owned by two or more persons without the right of survivorship and with no unity annexed to it save that of possession. The interests or quantities of ownership of the co-tenants may be different, and they may acquire them at different times and from different sources or titles. Upon the death of one of them his interest may descend to his heirs or be disposed of by his deed or will. The possession of one, however, is deemed to be that of all, and thus the unity of possession is requisite. The co-tenants may deal with their interests very much in the same way as

¹ See tenancy in common explained in the following paragraph.

if they owned them in severalty, except that while the estate continues to be in common no one of them can treat any part of the property as absolutely his own. This is the loosest and, as a rule, the most satisfactory of all the co-ownerships. It is the kind preferred and most frequently employed in this country.

§ 79. (4) **Estate by Entirety.** — When real property is conveyed to husband and wife, and nothing is said as to the quality of their interests, they take in it an estate by the entirety. They are said to be seised *per tout et non per my*. Hence, the right of survivorship attaches the same as in joint estates. But unlike joint tenants, neither husband nor wife, who hold an estate by the entirety, can sell or encumber the property so as to impair the right of survivorship of the other. This kind of estate is the strongest and most compact of all the co-ownerships. It has all the unities of time, title, interest, and possession. It exists in most of the United States; but in a few of them it has been abolished, directly or indirectly, by statute.

§ 80. (5) **Partnership Estates.** — When real property is purchased with partnership funds for partnership purposes, the partners are, in some respects, tenants in common thereof, while, in other particulars, they are joint tenants. As a general rule, they are the former as among themselves and the latter as to outside parties. The doctrine that the property is equitably converted into personalty while in their hands is also applied (fully in England, and in this country so far as required for working out the affairs of the firm) to determine the ultimate interests of those who claim rights in the same.

§ 81. (6) **Joint Mortgages.** — Where a mortgagee is regarded as the owner of an estate in the mortgaged property, two or more persons, who have each contributed some of the money to secure the re-payment of which the mortgage is given, become co-tenants of that estate; and their interests are sometimes those of joint tenants, while sometimes they are tenants in common. It may be said, as a general rule, that, as to their rights and interests as among themselves and without regard to any remedies which they may pursue for the recovery of the money, they are tenants in common; while, for the purpose of prosecuting their remedies — such, for instance, as foreclosure of the mortgage — they are joint tenants.

§ 82. **IV. Estates classified with Reference to their Qualified Nature.** — So classified estates are: 1, *Absolute or unqualified*, which need only to be mentioned here, and 2, *Qualified*. In the classification of estates with reference to their quantity, the qualified fees were explained as estates in fee; i.e. conveyed to one "and his heirs," but with some condition, limitation or restriction annexed, so that the owner does not have the fee simple, or unrestricted, perpetual dominion of the property. Such qualifications may be connected with estates of any quantity, as well as with a fee. Thus, property may be conveyed to A for his life, *provided* he do not sell intoxicating liquor upon the premises; or to A (without mentioning his heirs), *so long as* he does not sell intoxicating liquor there; or to B for ten years on condition that he live upon the land, etc. The species of interests found within the classes of which these are examples are, (1) Estates on condition, (2) Estates on limitation, (3) Estates on conditional limitation, and (4) Mortgages.

§ 83. (1) **An Estate on Condition** is one with some restriction or qualification annexed, to the effect that if a specified contingent event occur¹ the estate is to commence, or to be enlarged, diminished, or defeated. When the *commencing or enlarging* of the estate is made to depend upon the happening of the event, there results an estate on condition precedent; while in the other two cases, — when it is to be *diminished, or defeated* because of the occurrence, — there results an estate on condition subsequent. An estate to X for life, to begin when he marries Y and not before, is on condition precedent. Illustrations of estates on condition subsequent are, to X for fifty years, provided he sell no intoxicating liquor on the premises; to X and his heirs, to be cut down, however, to an estate for his life, or to be wholly defeated, if Z come back from Rome. When any estate whether it be a fee or a lesser interest is on condition subsequent, two things are necessary to terminate it; namely, breach of the condition and

¹ The expression, "if some contingent event occur," and those of similar meaning, are used here and elsewhere, in speaking of this group of estates, in a general sense, to denote the coming to pass or occurring of that which is indicated as the cause for the termination or passing over of the estate. It, accordingly, includes the

failure of something to happen, when that is specified as such a cause. Thus, if real property were conveyed to X for life, on condition, however, that he should marry Y within the next ten years, the happening of the contingent event in that case would be the failure of X to marry Y within the specified ten years.

re-entry upon the land by him who created the estate, or by his successor in interest. The property then reverts to him who so enters.

§ 84. (2) **An Estate on Limitation** is one created by the use of words denoting duration of time, such as "while," "during the continuance of," "so long as," etc. — any expression that is a translation of *donec*. Thus, a conveyance to X, so long as he shall live on the premises, creates a life estate on limitation. And an estate to X and the heirs of his body, while they do not sell intoxicating liquor on the land, is a fee tail on limitation. The happening of the specified event — the natural ending of the limitation — in itself terminates such estates as these; and the property reverts at once to him who created the estate, or to his successor in interest, without the necessity for any re-entry.

§ 85. (3) **An Estate on Conditional Limitation** arises from a conveyance of real property to one person, with words of either condition or limitation, and with the further proviso that, upon the happening of the specified contingent event, it shall depart from him and go over to another person. Such are estates, to X and his heirs until he marries and then to Y and his heirs; to X for ten years, but if he sell intoxicating liquor on the land, then to Y for the residue of the term; to X and the heirs of his body, provided that if Y return from Rome it is to go to Y and his heirs forever. The distinctive feature of such an estate is that the mere happening of the specified event *prematurely* terminates the interest of the first party and carries it over to the other. The common-law courts disliked this characteristic, and, therefore, were opposed to estates on conditional limitation.

§ 86. (4) **Mortgages**. — One of the original forms of estates on condition subsequent has developed, through changes wrought chiefly by courts of equity, into the modern mortgage, with its varied forms and remedies. In England and a few of the United States, a mortgage transaction still results in the conveying of a conditional estate to the mortgagee. But, as was heretofore said,¹ in most of the American states, the mortgagee now acquires only a lien on the land, before foreclosure; and all the estate, both legal and equitable, is retained by the mortgagor until foreclosure of the mortgage is complete. The *form* of the contract remains everywhere that of a sale, on condition that the vendor (mortgagor) may recover the property

¹ § 81, *supra*.

if he repay the money loaned or do some other prescribed act on or before a designated day, which is called the "law day;" but its substance and operation have been vastly changed, chiefly through the invention and use of the "equity of redemption."¹ And the generally accepted definition of a modern mortgage is: "Any conveyance of land intended by the parties at the time of making it to be a security for the payment of money or the doing of some prescribed act."² The different forms and kinds of mortgages, the diverse theories under which they are dealt with in the several states, and the rights and remedies of the parties to them supply the subject matter for one of the most interesting and important chapters in the law of real property.

§ 87. **V. Estates classified with Reference to the Time when the Enjoyment of them may begin** — *whether the owner may have the possession or enjoyment of the property at present, or must wait for it till some future time.* The natural and established division of estates, from this standpoint, is into, 1, Estates *in præsenti* — in present possession; and 2, Estates *in futuro* — in expectancy, or future estates. For, although a man's interest in property may be very great, it may be so limited that it can not be enjoyed by him until some future time; and other interests, whether great or small, may be such as to afford immediate possession and enjoyment.

§ 88. **1. An Estate in Præsenti**, the familiar, ordinary kind of interest which gives actual permanency of the profits to continue as long as the estate, needs only to be mentioned as a class under this method of viewing estates. It is the kind of interest most frequently owned and most commonly desired.

§ 89. **2. Estates in Futuro**, or in expectancy, in which the right to possess and enjoy the property is postponed, are classified as (1) Reversions, (2) Remainders, and (3) Executory estates.

(1) *A reversion* is a future estate, created by operation of law, to take effect in possession, in favor of a grantor or his heirs or the heirs of a testator, after the natural termination of a prior particular estate granted or devised. If, for example, X, the owner of a piece of land in fee simple, convey it to Y for his life, the law at once creates and gives to X the residue

¹ See § 70, *supra*.

² Quoted and adopted from 2 Wash. R. P. p. *43, by the N. Y. Court of

Appeals, in *Burnett v. Wright*, 135 N. Y. 543, 547.

of the estate in fee simple, so that he may again possess the land after Y's death has naturally terminated Y's estate. Y's life interest is then the particular estate, and that which the law has created for or reserved to X is the reversion. If X die at or before the time when the grant to Y takes effect, or if the conveyance to Y be by will, the reversion is reserved for the heirs of X. So when the owner of an estate for life leases out the land, say for ten years, the law immediately creates and reserves for him a reversion of the residue of the life estate, so that he may again have possession after the particular estate for ten years has elapsed. A reversion is always made by operation of law, and never by act of the parties; it must always be preceded by a particular estate, upon which it is said to depend, and it must be so created and limited as not to curtail or interrupt that particular estate, but to take effect in possession at its natural termination.

(2) A *remainder* is a future estate, made by act of the parties, to take effect in possession after the natural termination of a prior particular estate, which is created by the same transaction. It differs from a reversion in that it is always made by act of the parties and never by operation of law. Thus, if X, the owner of a piece of land in fee simple, convey it to Y for his life and then to Z and his heirs forever, Y's life interest is the particular estate, and Z has a remainder in fee simple. So, X might make, from his estate, a number of successive remainders, as if he conveyed the land to P for ten years, then to Q for life, then to R and the heirs of his body, and then to S and his heirs forever. Like a reversion, a remainder must always be preceded by a particular estate, upon which it is said to depend, and it must be created to take effect in possession, if ever, at the natural termination of the particular estate, which it must never be made to interrupt or curtail. It is also requisite to a valid remainder that it shall be created by the same transaction as the particular estate upon which it depends. The primary division of remainders is into *a*, vested, and *b*, contingent. *a*. A vested remainder is one in which there is a present fixed right to future enjoyment of the property. An illustration is an estate to X for life, remainder to Y who is a living person. Here, while Y can not possess and enjoy the land until after the death of X, yet his *right* to such future enjoyment is not affected by any contingency or uncertainty. It may be added that a vested estate, generally, whether

a remainder or not, is defined as a present, fixed right to present or future enjoyment. *b.* A contingent remainder is one in which either the person to take it is not in being or not ascertained, or the event upon which it is to be enjoyed is uncertain, or both; and so the right to the future enjoyment of the property is not fixed. Illustrations are an estate to X for life, remainder to his unborn son; an estate to X for ten years, remainder to Y and his heirs forever if he marry Z; an estate to X for life and, at his death, to the person who is then president of the United States. It is also to be added that a contingent estate, generally, whether a remainder or not, is frequently defined as an uncertain right to future enjoyment. Special forms of contingent remainders are cross remainders and alternate remainders, as to each of which it is enough here to remark that it is made so that it will ultimately go to one of the other of two or more designated persons, as one or another of specified contingent events may occur. Any kind of remainder may be made directly in the legal estate, or by the employment of a use. When a contingent remainder is made in a use, it is known as a contingent use.

(3) *An executory estate* is one, *created by act of the parties*, to take effect in possession in the future, without any particular estate upon which it depends. Such an estate is illustrated by a devise of land to X and his heirs, to begin in possession when he marries Y; or to a minor for life, to commence on his twenty-first birthday; or to X, for life, and ten days after his death, to Y and his heirs forever. In the first two of these illustrations, no preceding estate whatever is mentioned; in the last one, while a preceding interest is given to X, yet the estate conveyed to Y, which is the executory one, does not depend upon it, since there is to be a period of ten days between them. It is this fact, of its having no particular estate upon which to rest, that distinguishes an executory estate from both a reversion and a remainder. The same fact also caused the common-law courts to look upon executory estates, when freehold in quantity, with disfavor, and to refuse to permit them to be made directly by deed. This aversion to them was due chiefly to the mode of procedure in the ancient methods of conveyancing, which will be fully explained hereafter. It is sufficient here to add that, at first by means of uses and powers, and subsequently by wills also, freehold executory estates were ultimately permitted to be created and employed.

But it is only by virtue of very modern statutes that they have been allowed to be created directly by deed. Before such recent statutes, the methods resorted to were: *a*, springing uses, *b*, shifting uses, *c*, dispositions of uses by virtue of powers and *d*, executory devises. *a*. A use made to arise in the future, without any preceding interest or particular estate on which it depends, is a springing use. Such is a conveyance by deed of land to X and his heirs for the use of Y when he marries. When Y marries, he acquires the use; and the Statute of Uses then executes it and thus confers on him the legal estate. Had the attempt been made to deed the legal estate directly to Y, but not to be vested in and enjoyed by him until his marriage, the deed would have been a nullity, if it were before the modern enabling statutes. *b*. A shifting use is a conditional limitation in a use. An illustration is an estate to X and his heirs, for the uses of Y and his heirs, but if Z return from Rome then for the use of Z and his heirs. The Statute of Uses, executing the use, bestows the legal estate upon Y, and shifts it to Z on his returning from Rome and thus acquiring the use. An attempt thus to shift the legal title directly by deed, and without employing the use, since it would curtail the first estate if allowed, would have been abortive before the modern enabling statutes. *c*. A power in this department of law is the right to dispose of a use. Accordingly, if an owner of land, instead of creating a springing use or a shifting one, confer on another person the right to dispose of future uses in the property; and the latter, who is the donee of a power, appoint the use to spring up in the future or to shift from one appointee to another, the Statute of Uses executes the uses as they come into existence, and thus executory estates emerge. A single illustration, which is enough here, is found in a power conferred by X, the donor, upon Y, the donee, to appoint the use in fee of a specified acre of land, and the appointment of that use by Y to Z and his heirs, to begin when Z marries. The Statute of Uses transfers the legal estate to Z as soon as upon his marriage he acquires the use. *d*. An executory devise is a future estate, created by will, such as could not be made directly by deed at common law. Illustrations are devises of the legal estate in land to X and his heirs to begin when he marries; to X and his heirs until Y returns from Rome, and then to Y and his heirs; to X for his life, and ten days after his death to Y and his heirs. The legal estate was allowed to

be thus disposed of by will, after the Statute of Wills, 32 Hen. VIII. ch. 1, as amended and explained by 34 & 35 Hen. VIII. ch. 5.¹ Executory freehold estates are favored by modern statutes, which in many of the United States now permit them to be made directly by deed, as freely as by will, and without the necessity of employing either uses or powers. Executory estates less than freehold have never been under the restrictions placed upon executory freehold estates by the common-law courts.

IV. *Titles to Real Property.*

§ 90. **Definition of Title — Its Elements — How acquired.** — Title is generally defined as the means of acquiring and holding the ownership of property. "*Titulus*," says Coke, "*est justa causa possidendi id quod nostrum est.*" Its distinction from estates in and holdings of realty has been already illustrated.² A complete title involves three elements; namely, possession, right of possession, and right of property. These appear, distinct and separate, in the process of acquiring title by adverse possession in one of the more conservative, common-law states, such as New Jersey, where sixty years of adverse holding and occupancy are frequently necessary to a complete transfer of title by this method. If, in that state, A without any apparent right take B's land from him and hold it adversely, A has at once possession, while B retains the right of possession and the right of property. For twenty years thereafter, B may perfect his title again simply by regaining possession.³ After twenty years of such adverse holding, A acquires both the possession and the right of possession; while B then has left only the right of property and can not now perfect his title again except by judicial proceedings. After forty years more of such adverse holding, making sixty in all, A acquires the right of property

¹ After the feudal system affected all the land in England, and before the Statute of Wills, it was impossible to dispose by devise of any *legal* estate in real property. Testators could will away only the *use*. Even their ability to do this was taken away by the Statute of Uses, 27 Hen. VIII. ch. 10. And so, for five years — from 27 Hen. VIII. to 32 Hen. VIII. — no valid devise was made in England of any

interest, either legal or equitable, in real property. After the Statute of Wills became operative, it was naturally construed as allowing executory *legal* estates to be devised, just as executory *uses* had been freely made by will before the Statute of Uses. Digby, *Hist. R. P.* (5th ed.) p. 382.

² § 66, *supra*.

³ Gen. Stat. of N. J. p. 1977, § 23.

also;¹ and B's title has thus passed to A, by three successive stages under the statute of limitations, each of which stages carried one of the elements of title.

The two chief methods of acquiring title to real property are, I. By descent, and II. By purchase.

§ 91. **I. Title by Descent.**—When an owner of real property leaves it, at his death, undisposed of by any act of his, the law at once casts it upon his heir or heirs; and this is the only instance, afforded by the common law, of title by descent. The heir or heirs, to whom the law thus transfers the real property of their deceased ancestor, are ascertained by the common-law canons of descent, or by the modifications of or substitutions for these which are made by the modern statutes of descent. It is to be noted that other methods of acquiring title by law are not treated as descent, but as purchase. Thus, a wife obtains dower, or a husband curtesy, by operation of law; but both of these interests are acquired by purchase. It is only when the law casts property upon an heir that title passes by descent.

§ 92. **II. Title by Purchase** includes all methods of acquiring property, other than that by descent as above explained. He who obtains land by will, or by adverse possession, acquires it by purchase; as does also the individual who takes it by deed, and the state to which it escheats when its owner dies intestate and without heirs. The divisions of this means of obtaining realty, which are suggested by convenience, are: 1, Title by purchase other than by alienation; and, 2, Title by alienation, which comprises the "four common assurances of the realm;" namely: (1) alienation by deed, or grant, (2) alienation by devise, (3) alienation by matter of record, and (4) alienation by special custom.²

§ 93. **1. Title by Purchase, other than by Alienation**, includes those forms which may be called subsidiary, and which are not so common as the other methods. It is enough here to name and briefly define each species. (1) Title by *escheat* is the passing of the property back to the state, as its primary and ultimate receptacle, when the individual owner has died intestate and without heirs, or without heirs who are capable of inheriting that particular property. Feudal escheat was the falling back of the estate to the lord, from the deceased vassal

¹ Gen. Stat. of N. J. p. 1972, §§ 1, 2.

² 2 Blackst. Com. pp. *293-*295.

who had died without heirs capable of inheriting; this was an incident of tenure, which ceased in this country with that method of holding real property; but it furnished the model upon which escheat to the state, as it now exists in the United States, was built up by statutes. (2) Title by *occupancy* results from property, which has been left vacant and unowned, being taken and appropriated as his own by an individual. The only remaining instance of it, at common law, is in the case where a tenant *per autre vie* dies before the *cestui que vie*; as if land be owned by X for the life of Y, and X die before Y. The common law then permits any one, who first obtains possession, to own and hold it for the rest of Y's life. Even this case of title by occupancy is now abolished, in most jurisdictions, by statute. (3) Title by *accretion* is that which results from the gradual increase (so gradual that an observer does not detect its progress as it is going on) along a stream, or lake, or the sea shore, as the action of the water causes additional particles to adhere to and thus become a part of the land. (4) Title by *forfeiture* is the result of some illegal act, or negligence, on the part of the owner of realty, whereby it passes either to the person injured or to the public. It is little countenanced in this country, and much less than it formerly was in England. (5) Title by *prerogative* is sometimes extended to cover such interests in real property as accrue to the crown, or to persons who claim under the title of the crown, by virtue of the position as *parens patriæ* occupied by the king. It does not exist in American law, and needs to be mentioned merely for the sake of completeness. (6) Title by *abandonment* — resulting from the former owner's leaving the land unoccupied, under circumstances which indicate that he does not intend to reclaim it, and its being taken and possessed by another — is commonly named as a separate and distinct class under this branch of our subject; but it will be found, as shown hereafter, that every case placed in this category properly belongs under the head of title by either estoppel, dedication, prescription, or adverse possession. (7) Title by *estoppel* arises from the fact that he who would otherwise be the owner of lands, tenements, or hereditaments is precluded by his own act or representation to assert, as against another claimant, his right or interest therein. As in the law of contracts generally, the estoppel effecting the passing of title may be either *in pais*, or of record, or by deed. (8) Title by *prescription*, by which incor-

corporeal hereditaments only are acquired,¹ is such as rests upon the presumption, after twenty years (this is the common law and ordinary period, though in some states it is made different by statute) of continuous, peaceable, uninterrupted and adverse enjoyment of such an incorporeal right, that he who has been so enjoying it had at one time a grant of it, which has been lost. The period of time required to perfect such a title and the requisites of the adverse user during that period have been worked out and prescribed by the common law, in analogy to the statutes of limitations, but without much direct statutory assistance. (9) Title by *adverse possession*, by which corporeal hereditaments only are acquired,² is wholly the creature of the statutes of limitations. The title to the land is passed over to the adverse holder as the result of twenty years (this is the usual period, though the statutes of the different states vary) of continuous, peaceable, uninterrupted occupation thereof with an adverse claim of right. Such occupancy is said, in some cases, simply to cut off the remedy of the rightful owner of the land, while the title is left theoretically at least in him; but in England and many of the United States it is held to pass the complete title to the adverse holder.³

§ 94. 2. **Title by Alienation.** — Alienation is the voluntary resigning or giving over of property by one person and its receipt and acceptance by another. The most common methods of acquiring realty are included within this class. As heretofore stated, they are the so-called "four common assurances of the realm;" namely: (1) Alienation by deed or grant, (2) Alienation by devise, (3) Alienation by matter of record, and (4) Alienation by special custom.

(1) *Alienation by Deed or Grant.* — A deed is a writing, containing the elements of a contract, signed, sealed, and delivered by the parties. Its most ordinary employment, of

¹ This is true when the word "prescription" is technically and accurately employed. But it is sometimes used in a sense broad enough to include the acquisition of any kind of real property, whether corporeal or incorporeal, by adverse holding or user for the requisite length of time. See *United States v. Chavez*, 175 U. S. 509, 522; *Davis v. Coblenz*, 174 U. S. 719, 724.

² But "adverse possession" and "prescription" are sometimes used

interchangeably. See last preceding note.

³ 3 & 4 Wm. IV. ch. 27, § 34; *Baker v. Oakwood*, 123 N. Y. 16; *Simis v. McElroy*, 160 N. Y. 156; *Campbell v. Holt*, 115 U. S. 620; *Turner v. New York*, 168 U. S. 90; *Hampton v. Commonwealth*, 19 Pa. St. 329; *Welch v. Wadsworth*, 30 Conn. 149; *Jones v. Jones*, 18 Ala. 248; *Cooley, Const. Lim.* (5th ed.) 449.

course, is in transferring or otherwise affecting the title to real property. The forms that it has assumed for these purposes are historically divided into three groups; namely: *a*, the common-law deeds; *b*, the forms of conveyancing that arose and operate by virtue of the Statute of Uses; and *c*, the kinds of deeds or grants at present employed. The word "grant" is here used, in connection with "deed," because it is the term now quite commonly employed by courts and writers to include practically all forms of alienation by deed.

a. The common-law deeds, which were the only ones known before the enactment of the Statute of Uses, embraced six forms that were primary and five that were secondary. A deed is said to be primary when it is capable of passing title from one person to another originally and completely, without reference to the previous operation of any other document or form of transfer; it is secondary when its operation depends on a former manipulation of the title through some other instrument or transaction. The six primary common-law deeds were, *feoffment*, which accompanied the ceremony known as livery of seisin of the land and conveyed corporeal hereditaments ordinarily in fee simple; *gift*, which transferred an estate tail; *grant* (in its original and narrower sense), which conveyed incorporeal hereditaments; *lease*, which dealt with a smaller estate, usually less than freehold; *exchange*, by which an estate in one piece of property was traded for the same quantity of estate in another, and *partition*, which allotted in severalty distinct pieces of property formerly owned by co-tenants. The five secondary deeds were: *confirmation*, used to validate and make indefeasible a prior voidable transfer; *surrender*, by which a tenant or temporary holder gave back his estate to the landlord or reversioner; *release* (the reverse of the surrender), by which a reversioner gave up his interest to the temporary holder of the land; *assignment*, which transferred to a third party the whole of a temporary interest, such, for example, as an estate for years, and *defeasance*, which has become a part of the modern mortgage and provides that a previous conveyance shall become null and void on the happening of a specified event. These ancient forms of deeds, with some modifications and occasionally with new names, are still generally retained. But, in some of the states of this country, the feoffment and

gift are no longer used.¹ The defeasance is now uniformly a mere clause or part of another deed, such as a mortgage, rather than a separate instrument by itself.

b. The operation of the Statute of Uses consisted in its taking the legal estate from him, who was seised of property for the use of another, and passing it over to that other, — the *cestui que use*, — thus “*executing*” the use by uniting it and the legal estate in the same person. While that statute, because of the ways in which it was construed, never accomplished what its framers intended — never destroyed uses — yet it soon came to be employed as a great convenience in secret conveyancing of real property. It was apparent, from the moment of its enactment, that title to real property might be readily passed from A to C by having it conveyed by A to B *for the use of C*. Thus the parties themselves transmitted (or transmuted) the title part of the way — from A to B — and the statute then carried it the rest of the way — from B to C. It was then said to be conveyed “by transmutation of possession.” But in this process the conveyance from A to B was necessarily open and notorious; for it must take place by feoffment and livery of seisin on the land, when it was called (a) a *Feoffment to uses*, or by a proceeding in court, when it took the form of either (b) a *Fine to uses* or (c) a *Common recovery to uses*. In order to avoid the publicity of such transfers and secretly to utilize the statute, three other methods of conveying by its aid, which were said to operate “without transmutation of possession” soon came to be very commonly employed. These were (d) *Covenant to stand seised*, (e) *Bargain and sale*, and (f) *Lease and release*. (d) *A covenant to stand seised* can operate only between husband and wife or persons related by blood, and for a meritorious or good consideration as distinguished from one that is valuable. Its simple operation is that, without going on the land and without any other act of publicity, A covenants and agrees to hold the property (stand seised of it) for the use of B. By virtue of such covenant, B becomes the owner of the use; and the Statute of Uses then instantly transfers to him the legal estate. (e) *The bargain and sale* is for valuable consideration, and does not require any relationship of blood or marriage. Without any publicity, A merely agrees to sell the land to B,

¹ Digby, Hist. Law R. P. (5th ed.) p. 16; 2 Poll. & Mait. Hist. Eng. L. (2d ed.) pp. 314–321.

and B bargains to purchase it. This agreement or "bargain" gives the use to B; and the Statute of Uses then instantly takes to him the legal title. The parties make the bargain, and the Statute makes the sale. (f) The secrecy of these forms of conveying being objectionable, it was provided by the Statute of Enrolment, 27 Hen. VIII. ch. 16, that any transfer of a *freehold* estate by bargain and sale should be invalid, unless made by deed and enrolled, within six months after its date, in one of the king's courts of record at Westminster. The conveyance by *lease and release* was invented for the purpose of evading that statute; and it consists of a bargain and sale of an estate *less than freehold* (usually for one year) from A to B, and then of a release from A to B of the residue of the estate in fee simple. Neither the bargain and sale for a term of years nor the release was required by the statute to be enrolled. These last three methods of disposing of and acquiring titles to realty, and also the feoffment to uses, are still permitted in most common-law jurisdictions. But the simpler forms of the deeds of to-day, as well as the better operation of our modern recording acts, have done away with their actual utility and use.

c. The modern kinds of deeds are modifications of those already mentioned; but, largely because of the prominence and importance now given to the covenants for title, and especially that of warranty, different names are generally employed. The four species most commonly used are: (a) The *quitclaim* deed, which was originally a mere release, but has come to be also in most states the lowest form of primary conveyance—a mere naked transfer, without any covenant as to title; (b) The modern *bargain and sale* deed, which is an outgrowth and condensation of the older deed of the same name—another but preferable form of naked transfer, without any covenant as to title; (c) The bargain and sale with one or more special covenants for title, such as the favorite covenant *against the grantor's acts*; and (d) The *warranty deed*, sometimes called the full covenant and warranty deed, which, in addition to purporting to convey the property in the strongest and fullest terms, contains all the usual covenants by which the grantor binds himself and his heirs forever to make good and defend the title of the grantee and his successors in interest. In addition to these chief species of conveyances, there are in use at the present time numerous

subsidiary forms, most of which are in substance modifications of the bargain and sale deed. Such are sheriffs' deeds, executors' deeds, referees' deeds, receivers' deeds, tax deeds, etc.

The modern deeds are also classified and discussed with regard to the kinds of grantors or parties by whom they are made and delivered. Thus, (a) the *public* grant (using grant in its generic sense) by the state or general government is one form; (b) the *office* grant, made by some duly authorized public officer, is another; and (c) the *private* grant — the most frequently employed form — is the third.

The essential requisites of all these forms of conveyances, their execution, delivery, witnessing, acknowledging, proving, and record, and their orderly component parts, as arranged by courts and statutes ancient and modern, present broad fields of inquiry and discussion within the domain of the law of real property.

(2) *Alienation by Devise*. — A devise is a gift of real property by will. The right thus to transfer landed interests, as it is now enjoyed, is the result of much change and development, in which famous statutes have played a very important part. Hence, the discussion of title by will embraces in the first instance (a) an explanation of the general nature and operation of devises in the different periods of their history. It next deals with (b) the present methods of executing wills, in order to make them capable of passing real property. And; lastly, it examines (c) the different varieties of devises and the general rules and principles of construction applicable to them.

(a) In the Anglo-Saxon period of the common law, and before the feudal system became established in England, wills of realty were quite freely permitted and used, at least by lords and great men. They were ordinarily made in writing, authenticated by the testator's making the sign of the cross upon them, and deposited in monasteries for safe keeping.¹ The introduction of feuds interfered with this system, because it was considered to be a right of the lord to prevent his vassal from willing away the legal estate in the land; and, until this difficulty was overcome by statute, no holder of land by tenure could devise any interest therein except the use or equitable estate.¹ It was decided that the Statute of

¹ Digby, *Hist. Law R. P.* (5th ed.) ch. viii.

Uses, 27 Hen. VIII. ch. 10, since it was to take the legal estate wherever the use was bestowed, had forbidden even the willing away of a use; and so there were no valid wills in England of *any* interests in real property for five years—from 27 Hen. VIII. to 32 Hen. VIII. By the Statute of Wills, 32 Hen. VIII. ch. 1, as amended and explained by 34 & 35 Hen. VIII. ch. 5, most legal and equitable interests in real property were permitted to be transferred by will in writing; and this was generally and somewhat loosely done until the enactment of the Statute of Frauds, 29 Car. II. ch. 3. The last-mentioned enactment, which required a will of realty not only to be in writing but also to be signed by the testator and attested and signed by at least three credible witnesses, controlled such instruments until the taking effect of our modern wills statutes, such as that of 1 Vict. ch. 26 in England, or the Revised Statutes of 1830 in New York. Thus, these modern statutes introduced the sixth and last general period in the history of wills of real property.

(b) The law of the place where the land is situated is that which is uniformly applied to the determination of the validity and effects of its transfer by will. Tersely summarized here, that law may be said usually to require that the written will shall be signed or *subscribed* by the testator, in the presence of at least two witnesses (some states require three, and that number is everywhere preferable), or if subscribed in their absence that the signature be acknowledged by him to them; that he declare to them that it is his will and request them to attest and subscribe it as witnesses, and that they thereupon attest and subscribe it as such witnesses. The different states, of course, have local variations in these requirements; (a) but those here stated are the essentials most uniformly prescribed.

(c) Among the most important matters relating to the

(a) The New York statute, as to the execution of a will, requires that: "1. It shall be subscribed by the testator at the end of the will: 2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses: 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament: 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator." N. Y. R. S. (9th ed.) p. 1877 (2 R. S. 63), § 40.

kinds or varieties of devises are those which arise from the operation of residuary clauses in wills, and from the lapsing of direct and explicit devises because of the death of the beneficiaries before the testators. At common law, a residuary clause or devise in a will—a general gift of the residue of the testator's property after specific gifts have been made—could not dispose of real property; but now, in England and most of the United States, the modern statutes have enabled it to do so. A will now generally speaks and operates as of the time of the death of the testator; and so lapsed devises may be taken up and disposed of by residuary clauses. The discussion of devises also calls for a resumé of the special forms of estates thereby frequently conveyed, such as executory devises, devises for charitable uses, etc

(3) *Alienation by Matter of Record.*—Title acquired by matter of record does not depend upon the direct acts of the parties, but looks to the sanction of a court for its substantiation and preservation. It is ordinarily the outcome of a judgment or decree. While, under the modern practice in this country, these do not as a rule *give* title, but merely crystallize and confirm that which is assumed to have already existed, yet they are to be examined as important methods of *perfecting* titles. Two kinds of assurances, moreover, which are within this group and were for a long time extensively used in England, did actually and originally in many instances transfer an entire interest in realty from one person to another. They were *finés* and *common recoveries*. The study of these two forms of judicial proceeding, which were technical, artificial, and collusive in character, throws much light upon the history and leading principles of a considerable part of the common law.

(4) *Alienation by Special Custom.*—There are no instances, of any practical importance, of title by special custom in this country. But a complete survey of our subject includes the few methods of thus acquiring property, such as those associated with Burgage tenures and Gavelkind holdings, which have been operative in some parts of England. The effects of some local customs in *modifying* the rights and interests of landowners, especially in cases where the estates are less than freehold, are also properly embraced within this subdivision of the methods of acquiring title.

§ 95. **Liens on Real Property.**—Ownership of real property

may be either free, clear, and indefeasible, or affected by liens or other encumbrances. An encumbrance is a right or claim against the property, which does not interfere with the passing of the title, but impairs the value. Such is a restriction as to use, more onerous than the law would naturally require, or a mortgage, or a lien for taxes or water rent. Some of these encumbrances, such, for example, as the first illustration just given, are not ordinarily liens, since they are only restrictions, and not claims for any payment or value out of the land. The discussion of these comes naturally in connection with the instruments which create them, such as conveyances, leases, and covenants. A lien—which is also an encumbrance—is a hold or claim, which one person has over the property of another as security for the payment of some charge or debt out of that property. As these are necessarily involved in a thorough examination of title to real property, they are logically to be discussed at the end of the subject of title.

The mortgage, which is one of the most important liens, has been already explained, as a development from estates on condition subsequent; and the equitable liens or mortgages, such as vendors' liens, vendees' liens, *lis pendens*, etc., were included in its discussion. Statutory liens remain to be noticed. And it will be sufficient here to name and define the most important forms among them. Such are liens for taxes, levied yearly by the public authorities against the property; also water rents—in the large cities,—and assessments or betterment charges imposed upon lands for payment for special public improvements at or near where the lands are located. Such also are judgment liens, obtained by the “docketing” of judgments against landowners, as authorized and regulated by statutes; mechanics' liens, filed pursuant to statute for compensation due to persons who have contributed labor or material to the repair or improvement of the land; attachment liens, obtained by plaintiffs during the pendency of litigation; and unsafe building liens and liens in favor of boards of health, which are filed because of the properties' violation of municipal ordinances or rules. Such rights, while not directly assailing the title, may readily take most or all of the value from its owner.

§ 96. **Registration of Titles and Liens.**—A system of “registering titles,” first brought into practice by Sir Robert

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Torrens in South Australia, and therefore known as the "Torrens System," has been substantially adopted in a few of the United States, such, for example, as Illinois and Massachusetts. It is entirely statutory; and the local acts vary considerably. But the general scheme includes a judicial proceeding to determine that the applicant owns the property, to which proceeding all interested persons are made parties, a certificate of title to the successful petitioner by a public official designated by the statute, registration of the certificate in a book kept for that purpose, all subsequent transfers and liens made by note on such certificate or a new one duly registered and the making of the certificate conclusive evidence of the title of its holder. The merits claimed for such a system are the security which it gives to titles and the ease and rapidity with which it enables them to be transferred.

It is hoped that the utility of the foregoing survey of the ground to be covered in the following chapters may be increased by the annexed tabulated summary of its contents.

Book I.
KINDS OF REAL PROPERTY.

- { PART I. LANDS.
- { PART II. TENEMENTS.
- { PART III. HEREDITAMENTS. { 1. Corporeal.
- 2. Incorporeal

Book II.
HOLDINGS OF REAL PROPERTY.

- { PART I. ALODIAL, before feudal system, and after the Revolu
- 1. Knight-service
- 2. Free and common socage.
- 3. Villein socage—Ancient
- 4. Pure villeinage.
- 5. Copyhold
- 6. Frankalmoin
- 7. Divine service.
- 8. Grand serjeanty.
- 9. Petty serjeanty.
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- { PART II. BY TENURE . . { 1. Legal.—Recognized in all
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Book III.
ESTATES IN REAL PROPERTY.

- { PART I. AS TO COURTS . { 1. Legal.—Recognized in all
- 2. Equitable
- { PART II. AS TO QUANTITY. { 1. Freehold
- 2. Less than Freehold . .
- { PART III. AS TO NUMBER { 1. Severalty. — Separate and
- & CONNECTION OF OWNERS. { 2. Joint Estates
- { PART IV. AS TO QUALIFIED { 1. Absolute — Not conditions
- OR UNQUALIFIED NATURE. { 2. Qualified
- { PART V. AS TO TIME FOR { 1. Present Estates — In poss
- ENJOYMENT TO BEGIN. { 2. Future Estates . . .

Book IV.
TITLE TO REAL PROPERTY.

- { PART I. BY DESCENT — Passing by law from ancestor to he
- 1. Other than by Alienation
- { PART II. BY PURCHASE . { 2. By Alienation. . . .

- (1) Rents { *a* Rent-service.
- (2) Franchises. { *b* Rent-charge.
- (3) Easements and servitudes. (License.) { *c* Rent-seck.
- (4) Profit à prendre.

tion in the United States.

emesne. } Chief forms.

. } Inferior or subsidiary forms.

courts.

- (1) Uses. { *a* Express { (a) Active.
- (2) Trusts { *b* Implied { (b) Passive.
- (3) Equities of Redemption. { *b* Implied { (a) Resulting.
- (1) Of inheritance { *a* Fee simple. { (b) Constructive.
- (2) Qualified fees { *b* Qualified fees { (a) Fee conditional — fee tail.
- (3) Fee on condition. { (b) Fee on condition.
- (4) Fee on limitation. { (c) Fee on limitation.
- (5) Fee on conditional limitation. { (d) Fee on conditional limitation.

- (2) Not of inheritance, or for life { *a* Conventional { (a) For one's own life.
- (3) For years (chattels real). { *b* Legal { (b) *Per autre vie*.
- (4) From year to year { *b* Legal { (c) For uncertain period which may last for life.
- (5) At will. { *b* Legal { (a) Curtesy.
- (6) At sufferance { *b* Legal { (b) Dower.
- (7) Jointure. { (c) Jointure.
- (8) Estate by marriage. { (d) Estate by marriage.

(4) At sufferance } Chattel interests.

distinct ownership.

- (1) Joint tenancy.
- (2) Coparcenary.
- (3) Estates in common.
- (4) Estates by entirety.
- (5) Partnership estates.
- (6) Joint mortgages.

nor qualified.

- (1) Estates on condition.
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- (3) Estates on conditional limitation.
- (4) Mortgages.

ssion.

- (1) Reversions.
- (2) Remainders { *a* Vested.
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- (4) Springing uses.
- (5) Shifting uses.
- (6) Powers.
- (7) Executory devises.

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- (1) By escheat.
- (2) By occupancy.
- (3) By accretion.
- (4) By forfeiture.
- (5) By prerogative.
- (6) By abandonment.
- (7) By estoppel.
- (8) By prescription.
- (9) By adverse possession.

- (1) By deed or grant { *a* Common-law kinds.
- (2) By devise. { *b* Kinds operating by Statute of Uses.
- (3) By matter of record. { *c* Modern kinds { (a) Public grant.
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- (5) Private grant.

BOOK I.
KINDS OF REAL PROPERTY.

PART I. — LANDS.

PART II. — TENEMENTS.

PART III. — HEREDITAMENTS.

PARTS I AND II.

CHAPTER V.

LANDS AND TENEMENTS.

§ 97. Lands.

§ 98. Tenements.

§ 97. **Lands.** — The topic of this book is real property, in the sense of things which are *objects* of ownership. The holdings of such things, the estates or interests in them and the titles to them are the distinct subjects of the other three books. Naturally the first of these *things*—these objects of ownership—which engaged the attention of men, was land—the real property that is cognizable by the physical senses. Land embraces whatever is parcel of the terrestrial globe, whatever is affixed thereto, whether by nature—as trees, grass, herbs, and water—or by the act of man—as houses, fences, poles, and wires—and all the space beyond them indefinitely outward. When the lawyer thinks of land, he must immeasurably enlarge upon the ordinary, lay conception of it and make it include everything of which his physical senses might give him knowledge, from the centre of the earth upward into unlimited space. *Cujus est solum ejus est usque ad cælum, et ad orcum.* I can restrain my neighbor from swinging his shutters out over my roof; and he who, without permission, digs into my soil a thousand feet below the surface, or flies in an air-ship thousands of feet above it, is guilty of trespass.¹

§ 98. **Tenements.** — As things not tangible, nor cognizable in any way by the physical senses, came more and more to

¹ See § 62, *supra*, and note; *Laybourn v. Gridley* (1892), 2 Ch. 53; *Lemon v. Webb* (1895), App. Cas. 1; *Chartiers Block Coal Co. v. Mellon*, 152

Pa. St. 286; *G. R. & I. R. Co. v. Butler*, 159 U. S. 87, 92; *Gouverneur v. Nat. Ice Co.*, 134 N. Y. 355.

demand a place in the domain of realty, the necessity arose for a word that should include these as well as land, and that should embrace practically everything that we now call real property. Tenure was affecting all these things; and between the twelfth and thirteenth centuries they all came to be denoted by the word *tenements*.¹ "Unless we are mistaken, that word first came into use for the purpose of comprising meadows, pastures, woods, and wastes, for at an early time the word *terra* will hardly cover more than the arable land. But *tenementum* will also comprise any incorporeal thing which can be holden by one man of another. . . . Thus, for example, rents charge, rents seck, rights of common, become tenements. Statutes of Edward I.'s day gave the word a sharper edge."² As already explained, the word "tenements" practically embraces all the forms of real property — real *things* — known to the American law.

¹ 1 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 236, note 3.

² 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 148.

PART III.

HEREDITAMENTS.

1. CORPOREAL.

2. INCORPOREAL.

CHAPTER VI.

HEREDITAMENTS EXPLAINED AND CLASSIFIED — CORPOREAL HEREDITAMENTS.

§ 99. **Hereditaments.** — Early local customs, under the name of “principals” or “heirlooms,” which gave certain favorite chattels to the heir,¹ gradually hardened into law and added to the category of real things some articles that are naturally neither lands nor tenements. The heir inherited them, as he did other real property; and so they and it came to be called collectively *hereditaments*. That word is accordingly used everywhere to denote every kind of real property. But in this country it is practically no wider in scope than tenements. And, as was explained above, it is possible to create a tenement which is not a hereditament.²

Dividing hereditaments into their two classes — corporeal and incorporeal — as to the first of these, it is only necessary to repeat that all real property that is tangible or in any way cognizable by the physical senses is said to be corporeal, and that all corporeal hereditaments are lands. All other hereditaments are incorporeal; i. e., mere *rights*, which arise out of things corporeal or are connected with or annexed to or exercisable within corporeal property. Comprising as they do some of the most valuable property interests of the present day, and ramifying into important kinds and species, the incorporeal hereditaments call for separate and careful con-

¹ 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 363.

² § 62, *supra*.

sideration. As was heretofore stated, their four kinds, which are important in the American law of real property, are (1) Rents, (2) Franchises, (3) Easements and servitudes, and (4) *Profit à prendre*.¹

¹ For the six other forms, which exist in England, see § 62, *supra*.

“ We can not leave behind us the law of incorporeal things, the most medieval part of medieval law, without a word of

admiration for the daring fancy that created it, a fancy that was not afraid of the grotesque.” 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 149.

2. INCORPOREAL HEREDITAMENTS.

CHAPTER VII.

(1) RENTS.

§ 100. Rent — Definition.

§ 101. Kinds of rent.

a. *Rent-service.*

§ 102. Rent-service — Incident of reversion.

§ 103. Fealty — Estoppel to deny title.

§ 104. Distress — Remedies for non-payment, etc.

§ 105. To whom rent-service reserved — To whom proceeds payable.

§ 106. Assignment, or transfer.

§ 107. Discharge — Suspension — Apportionment.

§ 108. Discharge of rent-service.

§ 109. Suspension of rent-service.

§ 110. Apportionment of rent-service.

§ 111. Effects of destruction of or injury to buildings.

b, c. *Rent-charge, Rent-seck.*

§ 112. Definitions and distinctions.

§ 113. General characteristics of rent-charge and rent-seck.

§ 114. Remedies for enforcing and recovering proceeds.

§ 115. Reservation. Assignment, or transfer.

§ 116. Discharge, suspension, and apportionment.

§ 117. Discharge of such rents.

§ 118. Suspension of such rents.

§ 119. Apportionment of such rents.

§ 100. **Rent — Definition.** — The early common-law rent (*reditus*) was a mere right to services rendered by a tenant to his lord or landlord. This has been styled the old “tenorial” rent.¹ But other cognate rights have been so persistently designated by the same word that the rent of to-day must be defined in broader terms. It is a *right to a certain profit issuing periodically out of lands or tenements*.² And the elements of this definition require careful attention.

¹ 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 129.

² The substance of this definition is from 2 Minor’s Inst. 32. It is there added that the right must issue out of lands or tenements *corporeal*. This re-

quirement is undoubtedly correct, as viewed from common-law theory; and it may well be added that Dr. Minor’s exposition of the law of rent is probably the clearest and most scientific one in existence. But, since the practice is

In the first place, then, rent is a mere *right*. It is not the money, goods, or services, which the tenant renders to his landlord, nor is it the mere privilege of suing for any of these things when due; but it is a right against the realty to receive from it some compensation or return. Hence it is incorporeal.¹ The money, or other thing of value, which the rent is the right to receive, is the proceeds, fruits, or profits of the rent. It will prevent much confusion of thought and conduce to clear and accurate results to bear this distinction constantly in mind.² Rent, as thus understood, is ordinarily real property or a chattel real; while its fruits or proceeds, when received, and the right to sue for them when due and unpaid are personalty.

Again, rent is a right to a *certain profit*. This profit, or the fruits or proceeds of the rent, may consist of money, goods, services, or any other things of value.³ It was at first commonly paid in services, rendered by the vassal to his lord or the tenant to his landlord, which fact gave the name to the most important kind of rent—the rent-service.⁴ The things thus rendered must be a gain or *profit* to the owner of the rent, and not anything which he had before the rent was created. Therefore, a return of part of the soil to the grantor of land or of trees or herbage growing upon it at the time of the grant could not be properly treated as the proceeds of rent; but a reservation of crops yet to be grown or of cattle thereafter to be raised on the premises may be so treated.⁵

now so common of leasing out incorporeal rights, such for example as railroad franchises, and having the right to the compensation from the lessee constantly treated by the courts as *rent*, it is thought best to omit from our definition all requirement that the property out of which it issues shall be corporeal. See *Eastman v. Anderson*, 119 Mass. 526.

It is said by some authorities that rent may issue also out of "the furniture," which is leased together with the real property in which it is located. *Mickle v. Miles*, 31 Pa. St. 20.

¹ *Van Rensselaer v. Read*, 26 N. Y. 558, 564; *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429, 580, 158 U. S. 601; 2 Min. Inst. 32.

² Writers, and even courts, fre-

quently use the word "rent" to mean or include these returns or proceeds. See 2 Blackst. Com. p. *41; 3 Kent's Com. p. *360; 2 Leake, 373; Standard Dict. "Rent;" Abb. L. Dict. "Rent;" *Priester v. Hohloch*, 70 N. Y. App. Div. 256.

³ Lit. § 213; *Keneage v. Elliott*, 9 Watts (Pa.), 258; *Cornell v. Lamb*, 2 Cow. (N. Y.) 652.

⁴ 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 129.

⁵ *Coltness Iron Co. v. Black*, L. R. 6 App. Cas. 315, 335; *Reg. v. Westbrook*, 10 Q. B. 178; *Buckley v. Kenyon*, 10 East, 139; *Moulton v. Robinson*, 27 N. H. 530; *Johnston v. Smith*, 3 P. & W. (Pa.) 496; *Co. Lit.* 142a; 2 Min. Inst. 33.

And the profit must be *certain* or ascertained in amount. Hence, the right to labor, or money, generally and without any quantity being fixed or any method being designated for determining how much it shall be, is not rent. But, in conformity to the maxim *id certum est quod certum reddi potest*, it is sufficient if some standard or *criterion* be fixed upon by which the amount can be ascertained. Thus, the right to receive for the use of leased premises as much a year as X, an outside party, shall decide upon, or the price of one hundred bushels of wheat at a designated market on a day specified, is a good rent.¹

The profit or proceeds of the rent, moreover, must issue *periodically*. This may be yearly, quarterly, monthly, weekly, or as measured by any other definite periods; but it must be at regular, equal intervals throughout the time during which the rent is to continue.² Hence, if one purchase land, and, instead of paying a gross amount for the same, agree to pay a fixed sum yearly or monthly, etc., while his estate continues, the right of the grantor to receive such payments is rent; while if the agreement be that the purchase price shall be paid in instalments, *but not at regular intervals during the continuance of the estate*, the right to such instalments is not rent.³

The profit must issue out of *lands or tenements*, i. e., out of tenements of some kind.⁴ It is this requirement that distinguishes rents from annuities. The latter are rights to periodical income or payments, which are fixed and certain; but they are charged upon the *person* who is to make the payments, and not upon real property.⁵ The primitive idea of rent was that it must be attached to *corporeal* hereditaments; for the right to distrain upon the property out of which it issued, i. e., the right to take goods and chattels therefrom

¹ Walsh v. Lonsdale, L. R. 21 Ch. Div. 9; Smith v. Fyler, 2 Hill (N. Y.), 648; Commonwealth v. Contnor, 18 Pa. St. 439, 447; Ocean Grove Camp M. Ass'n v. Sanders, 67 N. J. L. 1; Cross v. Tome, 14 Md. 247; McFarlane v. Williams, 107 Ill. 33; Dutcher v. Culver, 24 Minn. 584; Co. Lit. 96 a; Gilbert, Rents, 9. But it has been said in Massachusetts that, "the word 'rent' may include the compensation to be paid for the occupation of land by a

tenant . . . whether the amount to be paid has been defined by the agreement of the parties, or has been left indefinite." Kites v. Church, 142 Mass. 586, 589.

² 2 Blackst. Com. p. *41.

³ 2 Min. Inst. 33.

⁴ Co. Lit. 142 a; Watk. Conv. 273; Eastman v. Anderson, 119 Mass. 526.

⁵ 2 Poll. & Mait. Hist. Eng. L. (2d ed.) v. 131; 2 Blackst. Com. p. *40.

for arrears of the payments or render to be made, which was always incident to a proper rent, could not be enjoyed out of things intangible and incorporeal.¹ But even the early common law recognized some species of rights called rents, to which distress did not belong.² And, although perhaps the most numerous authorities still insist that rent must issue out of land, yet practically it is now generally treated as capable of being incident to all kinds of tenements, and even in some cases to the furniture that is leased with them.³

§ 101. **Kinds of Rent.** — The three important classes, into which all rents are divided, are: a, *rent-service*, b, *rent-charge*, and c, *rent-seck*. Rent-service, which is the most common and important of the three, is a rent reserved upon a grant or lease of real property when a *reversion* exists in the grantor or lessor.⁴ The relation of landlord and tenant, as it is familiarly known to-day, ordinarily gives rise to this kind of rent. Rent-charge is that for which the land is specially *charged* or encumbered with a distress,⁵ usually by the terms

¹ 2 Blackst. Com. p. *41; 2 Min. Inst. 33; 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 133; Raby v. Reeves, 112 N. C. 688; Whitaker v. Hawley, 25 Kan. 674.

² This is *rent-seck*. See § 112, *infra*.

³ Eastman v. Anderson, 119 Mass. 526; Mickle v. Miles, 31 Pa. St. 20; Vetter's Appeal, 99 Pa. St. 52; Newman v. Anderton, 5 Bos. & P. 224; 5 Co. 116 b; Gilbert, Rents, 187. In those states like New York, in which all distress for rent has been abolished by statute, this use of the word "rent" is wholly logical, as well as customary and convenient. See N. Y. L. 1846, ch. 271; Stim. Amer. Stat. L. § 2031. It was also argued, against the possibility of rent issuing out of incorporeal hereditaments, that, since they were originally allowed for the public good, they were not fit subjects for private profit. Upon this matter, Dr. Minor says: "Hence, if one seised in fee simple, of a way, or common, should lease it for years, reserving a periodical compensation therefor, it is *not a rent*, because it issues out of an *incorporeal*, and not a *corporeal* tenement. (Gilb. Rents, 20, etc.; 1 Th. Co. Lit. 441-442.) The reasons assigned for this doctrine are that the person en-

titled *cannot distrain* for the amount in arrear where the tenement is incorporeal; nor can he have a writ of *assize*, inasmuch as the recognitors of *assize* cannot have a view of the subject; and that incorporeal hereditaments were originally created and allowed for the *public good*, and therefore were not deemed fit subjects of *private profit*. Hence, although a reversion and remainder are *incorporeal*, yet upon a grant of either, reserving a return or compensation, such compensation is a *proper rent*, because the estate was created to *make profit of*; and although there can be no distress until by the determination of the particular estate the interest in reversion or remainder comes into possession, yet *then the grantor of the land may distrain for all arrears*. (Gilb. Rents, 21 to 23; 1 Th. Co. Lit. 442.)"

⁴ This means that the grantor or lessor lets out a smaller interest in the property than he himself owns, and retains the residue, as when an owner in fee leases the land for a term of years, or for one's life. See "reversions," § 89, *supra*.

⁵ It may conduce to clearness to repeat here that the right of, "distress,"

of the grant or reservation, and where the owner of the rent *has no reversion* or other expectant interest in the land itself. Rent-seck is like rent-charge in the fact that its owner has no reversion in the land or tenement out of which its fruits are to issue; but it differs from the latter in that its owner has no right of distress. It is, therefore, *reditus siccus*, or dry or barren rent, because there is no means of enforcing the rendering of its proceeds except by action at law.¹ Each of the three forms of rent thus briefly defined will be explained more in detail hereafter. Particular names have also been given to some special sorts of rent, which are not employed in this country and which it will suffice to name and tersely define. Thus, the certain, established rents of the ancient freeholders and copyholders of manors, which can not be departed from or varied, are rents of *assize*. Such of these as were paid by the freeholders are often called *chief-rents*, *reditus capitales*; and both sorts are indifferently denominated *quit-rents*, because by the rendering of them the tenant is freed from all other services and returns. Where the payments required were to be made in silver, the rent was often called *white-rent*, *blanch-farm*, *reditus albus*; and it was thus distinguished from those in which the fruits or returns consisted of labor, grain, or other sorts of money, which were designated *black-mail*. When the sum to be paid is as much as the use of the tenement is worth during the period for which it is to be so paid, or is nearly equal to that amount, it is frequently denominated *rack-rent*. All of these are simply varieties of the three important classes above outlined.²

a. *Rent-service.*

§ 102. **Rent-service — Incident of Reversion.** — The letting out of lands to be held by tenants, upon their making compensation or return to the owners, is doubtless as old as individual proprietorship in real property. And the use of

or of "distraining," means the privilege of going on the land and taking any goods or chattels there, in payment of any amount due as return or proceeds of the rent. At common law, it belongs, as matter of right, to the owner of a rent-service; but it must be specifi-

cally created by contract, in order to attach to any other species of rent.

¹ This is Littleton's classification, which has been uniformly followed. Lit. § 213; 2 Blackst. Com. p. *42; 3 Kent's Com. p. *460.

² 2 Blackst. Com. pp. *42, *43.

the word, *rent* (*redditus*) or its equivalent is almost as ancient.¹ In England, however, the law of rent did not assume any special importance, nor call for much care from the courts, until after the *villeins* or slaves, who had cultivated the *demesnes* of the great lords of manors, began to be emancipated; and then to have parcelled out to them, to cultivate for the support of themselves and their families, the lands to which they had been attached.² Those to whom the corporeal property was thus given out were required to render to or for its owner (the reversioner), at regular intervals, a designated quantity of corn, wheat, or other provisions, or the performance of a stipulated amount of work and services.³ The uniform result of such an arrangement was that the owner or proprietor of the land retained a reversion to himself or to himself and his heirs. He passed away to his tenant only a portion of his own interest, whether that portion were for one or more years, or for the life of the tenant or some other person, or in fee of some kind, and retained the residue. And so it came about that whenever, for a regular, periodical return of value from the tenant, land was parted with by one who retained the ultimate ownership, his right to the receipt of such value was designated rent-service. The passing away of the property and the reservation of an interest therein, in addition to the rent, are still requisites of this sort of rent. And, therefore, rent-service may be more comprehensively defined as the *right* to a *certain profit* out of lands or tenements, belonging to the owner of a *reversion*, in return for the property that passes. This is to-day, as it always has been, the most important form of rent. It is associated with nearly every relationship of landlord and tenant; and it comes into being as an incident of the landlord's reversion.⁴

¹ See 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 129.

² Ibid.; 3 Cruise Dig. p. *271 *et seq.*

³ In process of time, the lands so let out were called *farms* — from the Anglo-Saxon word *feorm*, which means provisions. The right to the compensation was rent; and, since at first it was commonly in form of services, it was distinguished from the other forms of rent by the name *rent-service*. Gilbert, Rents, 9; 3 Cruise Dig. p. *272.

⁴ Before the 18th year of Edward I. (1290), rent-service could be reserved

to the grantor of an estate in fee simple. For, although in one sense he parted with all his interest in the land and kept no reversion, yet, because of the rights as lord of the fee which the feudal system enabled him to retain, chief among which rights was that of taking back the land if the grantee — the vassal — violated any of his feudal obligations, the grantor could and usually did retain for himself and his heirs a *quasi* reversion, which was called his "possibility of reverter" and which was sufficient to have a rent-service as its incident. But

§ 103. **Faalty to Owner of Rent-service — Estoppel to deny Title of Reversioner.** — “When a tenant holds his land by faalty and certain rent,” says Cruise, “it is a *rent-service*; and this was the only kind of rent originally known to the common law.”¹ The mutual bond or obligation of a vassal to his lord, which the feudal law styled faalty, required among other things that the tenant should defend the title of his lord, promptly notify him of any attacks upon it, and never in any way assert any right or interest in the land adverse to his. None of the feudal effects of this relation can operate now in this country; but, whether it be as many have supposed an outgrowth of the ancient faalty, or a principle which has grown up independently thereof, the estoppel of a tenant to deny the title of his landlord is as strong a rule of law to-day as it was in the time of Lord Coke. And so, as a more modern American enunciation of the principle than that above quoted from Cruise, it may be said that whoever holds real property out of which proceeds a rent-service is in general estopped to deny the title of his landlord, the reversioner.²

§ 104. **Distress — Remedies for enforcing Rent-service and recovering its Fruits or Proceeds.** — “The characteristics of rent-service; 1. It arises by reversion, and is always in retri-

the statute *quia emptores* (18 Edw. I. ch. 1) provided that, in all conveyances in fee simple except those made directly by the king or with his waiver of the statute, the grantee should not hold his land by tenure of the grantor, but should hold of the same lord of whom the grantor had held. This did away with all feudal obligations and relations between grantor and grantee in fee simple, when both were subjects (except where the king, waiving the statute, permitted his own tenants to make such a relation between themselves and their grantees), and thus rendered it impossible to reserve a rent-service upon such a transfer. The ordinary grantor in fee simple has now no reversionary interest of any kind, to which a rent-service can attach as incident. Lit. §§ 122, 216-218, 225-228; Den d. Farley v. Craig, 15 N. J. L. 191; Bradbury v. Wright, 2 Doug. 624; Van Rensselaer v. Hayes, 19 N. Y. 68; Van Rensselaer v. Chadwick, 22 N. Y. 32; De Lancey v. Piepgras, 138 N. Y. 26, 38. The

statute of *quia emptores* is recognized as law in all of the United States, except Pennsylvania and possibly one or two other states. And, therefore, outside of such exceptional states, the uniform rule both here and in England, is that rent-service can not be reserved on a grant of land in fee simple. Ibid.; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Gray on Perpetuities, §§ 20-51. Stat. *quia emptores*, § 291, *infra*, and note on Manor Lands of New York at the end of Ch. XVII, *infra*.

¹ Greenl. Cruise Dig. tit. xxviii. ch. i. §§ 2-8.

² Delaney v. Fox, 2 C. B. n. s. 768; Rowan v. Lytle, 11 Wend. (N. Y.) 616, 621; Whiting v. Edmonds, 94 N. Y. 309; Longfellow v. Longfellow, 54 Me. 240, 61 Me. 590; Gray v. Johnson, 14 N. H. 414. This principle, which simply needs to be stated here to complete our view of rent-service, is discussed more fully in connection with estates for years. For its origin and history, see 6 Amer. L. Rev. 1.

bution for the land out of which it issues; 2. It supposes a tenure" (holding) "of the grantor and a reversion to him; 3. The arrears are recoverable *by distress as of common right*."¹ The distinguishing feature of this last-mentioned right, as connected with rent-service, — the right to take goods and chattels of the tenant from the land to an amount sufficient to pay the sum due as fruits or profits (arrears) of the rent, — is that it was given to the lord or landlord by the common law as a matter of *common right*, and needed not to be reserved or mentioned in the contract of letting the land.² It was because of the existence of this right to distrain, then inseparably connected with rent-service, which was *the* rent of the early common law, that the early writers laid it down that rent must issue out of land or tenements corporeal; for such property is, of course, the only kind upon which distress can be made.³ In a number of the United States, such as New York, Wisconsin, and Minnesota, the drastic remedy of distress has been abolished by statute.⁴ (a) It is not generally favored in this country, even where not abrogated.⁵ In England, it has been extended to all kinds of rent; and it is treated with similar favor in one or two of the American states.⁶

The ordinary modern remedy for obtaining the proceeds or fruits of rent-service when due is an action of debt,⁷ or

(a) The Revised Statutes of New York (1830) gave preference to a landlord's claim for arrears of rent, over judgment creditors of the tenant. 1 R. S. 476. By the laws of 1846, ch. 271, 274, which was one of the results of the "Tenants' War," this preference was done away with and all distress for rent of every kind was abolished. See 4 Wilson's Hist. Amer. People, p. 131.

¹ 2 Min. Inst. 36.

² 3 Cruise Dig. p. *272; Bac. Abr. Rents (A) 2; 2 Blackst. Com. p. *42; 2 Poll. & Mait. Hist. Eng. l. (2d ed.) p. 576; Cornell v. Lamb, 2 Cow. (N. Y.) 652. Originally, this right merely enabled the reversioner to seize and retain the goods and chattels. But by statute it has been made to include the right to sell them and apply the proceeds to the payment of the amount due. Stat. 2 Wm. & M. ch. 5; 3 Blackst. Com. pp. *13, *14; 2 Taylor, Landl. & T. § 557; 1 McAdam, Landl. & T. p. 200.

³ 2 Blackst. Com. p. *41; Common-

wealth v. Contner, 18 Pa. St. 439, 447.

⁴ 1 Stim. Amer. Stat. L. § 2031.

⁵ See Crocker v. Mann, 3 Mo. 472; Harrison v. Ricks, 71 N. C. 7; Greenl. Cruise Dig. tit. xxviii, ch. i. § 65, n. 1.

⁶ 4 Geo. II. ch. 28, § 5; Mutoscope & B. Co. v. Homer (1901), 1 Ch. 671; Mitchell v. Franklin, 3 J. J. Marsh. (Ky.) 477, 480; 2 Min. Inst. 37.

⁷ Co. Lit. 47 b; Gilbert, Rents, 93, 98; Walker's Case, 3 Co. 22 a; McKeon v. Whitney, 3 Denio (N. Y.), 452; Howland v. Coffin, 9 Pick. (Mass.) 52, 12 Pick. 125; Ryerson v. Quackenbush, 26 N. J. L. 236; 1 McAdam, Landl. & T. p. 349.

an action on the covenant or special promise contained in the lease.¹ A similar remedy, given by statutes, though not technically based on rent, is the action in *assumpsit* for use and occupation, in cases where the relation of landlord and tenant exists and a return for the use of the land is implied but no definite amount is agreed upon.² It seems to be generally recognized, also, that a proceeding by bill or petition in equity may be had, for enforcing rights arising as or from rent or from the use of realty, when for any reason there is no adequate redress at law.³

In the liberal methods of procedure permitted by our modern codes, when the reversioner brings an action for the arrears or fruits of the rent, the tenant sometimes defends by denying the existence of *any rent*; and the court, if of competent jurisdiction, proceeds to try and determine the issue thus raised, which involves both the question of rent and that of the right to its proceeds.⁴ The rent-service *per se* is thus established in an action purely personal in nature;⁵ but this should be carefully noted as an outcome of liberal judicial procedure and not allowed to engender any confusion as to the distinction between rent-service and its proceeds or profits. It is also to be carefully noted, however, that the word "rent" is commonly used, in a loose sense, to denote such proceeds or profits; and that actions are constantly said to be "for the recovery of rent," whether their object be for obtaining such fruits or proceeds alone, or for that purpose and also for the establishment of the *right*.

¹ Thursby v. Plant, 1 Saund. 237; Ellis v. Rowbotham (1900), 1 Q. B. 740; Cross v. United States, 81 U. S. (14 Wall.) 479; Kiersted v. O. & A. R. Co., 69 N. Y. 343; Greenleaf v. Allen, 127 Mass. 248; U. P. R. Co. v. C. R. I. & P. R. Co., 164 Ill. 88; Brown v. Cairns, 63 Kan. 693.

² Stat. 2 Geo. IV. ch. 19, § 14; N. Y. L. 1896, ch. 547, § 190; Greenl. Cruise Dig. tit. xxviii. ch. i. § 77; Gibson v. Kirk, 1 Q. B. 850, 856; Osgood v. Dewey, 13 Johns. (N. Y.) 240; Collyer v. Collyer, 113 N. Y. 442, 448; Codman v. Jenkins, 14 Mass. 93; Kline v. Jacobs, 68 Pa. St. 57. This form of action will not lie where the technical relation of landlord and tenant does not exist. Preston v. Hawley, 139 N. Y. 296; Lloyd v. Hough, 42 U. S. (1 How.) 153;

Nat. Oil Ref. Co. v. Bush, 88 Pa. St. 335; Goddard v. Hall, 55 Me. 579; Weaver v. Jones, 24 Ala. 420.

³ Cockles v. Foley, 1 Vern. 359; Hamero v. Hamero (1894), 2 Ch. 564; Pa. R. Co. v. St. L. A. & T. H. R. Co., 118 U. S. 290; Borchering v. Katz, 37 N. J. Eq. 150; 2 Taylor, Landl. & T. § 656 *et seq.* These various remedies will be more fully discussed in dealing with the law of landlord and tenant.

⁴ Mayor v. Sonneborn, 113 N. Y. 423; Bath Gas L. Co. v. Claffy, 151 N. Y. 24; Chaplin, Landl. & T. p. 169 *et seq.*

⁵ "The appropriate remedy for the recovery of a rent, before the abolition of real actions, was by Assize of Novel Disseisin." Digby, Hist. Law R. P. (5th ed.) p. 239, note.

In most of the states of this country, summary proceedings for quickly dispossessing tenants, who fail to make the payments when due, are given by statute. They are effective against those who are unquestionably tenants and who can not or do not set up an adverse claim of title.¹ They are not, strictly speaking, a form of remedy *for the recovery of arrears of rent*, since their only result usually is to put the tenant out of possession; but the practical outcome of the institution of such proceedings is very frequently to bring about a prompt payment or return which else would have been delayed or not made at all. The same results are often obtained, though more slowly, in an action of ejectment or its equivalent prescribed by statute, by which *title* to the rent, or land, or both, is now ordinarily determined.² The common law, and that of most of the United States at the present time, requires a clause of re-entry in the lease or grant, in favor of the lessor or grantor, in order that he may retake possession, or eject the tenant from the land for non-payment of rent.³ The common law was also very minute and exacting in its requirements as to demand for the payment, as a prerequisite to such procedure; but those stringent rules are now generally much modified or entirely abrogated by statutes.⁴ (a)

(a) In New York the stringent common-law requirements as to demand for payment of arrears of rent were abolished by L. 1805, ch. 95 (based on Eng. Stat. 4 Geo. II. ch. 28), which provided that an action of ejectment "should stand instead of a demand of the rent in arrear." This was found (in 1813) in 1 R. L. ch. 63 (p. 440), § 23, and (in 1830) in 2 R. S. 505, § 30, and is now § 1504, Code Civ. Pro. Again, a very usual clause in common-law leases was that which reserved to the lessor a right of re-entry in default of goods whereon to distrain. By the same act that abolished distress for rent, L. 1846, ch. 247, § 3, it was provided that, where such a clause exists, ejectment may be had for non-payment after fifteen days' notice of intention to begin the action; that statute is now § 1505, Code Civ. Pro.

The result of these two sections of the Code of Civil Procedure, — §§ 1504,

¹ See N. Y. Code Civ. Pro. §§ 2231-2265; 2 McAdam, Landl. & T. ch. 34; Chaplin, Landl. & T. p. 539 *et seq.*

² Willison v. Watkins, 28 U. S. (3 Pet.) 43, 48; Jackson v. Collins, 11 Johns. (N. Y.) 1, 5; Bradt v. Church, 110 N. Y. 537; Sand v. Church, 152 N. Y. 174; Hall v. Dewey, 10 Vt. 593; Fusselman v. Worthington, 14 Ill. 135. "To maintain ejectment for non-payment of rent, the demise must contain a proviso or condition which will afford

a right of re-entry." Chaplin, Landl. & T. § 583.

³ Ibid.; Jackson v. McClellan, 8 Cow. (N. Y.) 295; Delancey v. Ganong, 9 N. Y. 9; Jones v. Reilly, 174 N. Y. 97, 103, 104.

⁴ 2 Geo. II. ch. 28; Stim. Amer. Stat. L. §§ 2020-2040. These common-law requirements will be explained in discussing the law of landlord and tenant.

§ 105. **To whom Rent-service may be reserved — To whom its Proceeds are payable.** — Since rent-service is in return for the land that passes, it must be reserved to the grantor or lessor, or to him and his heirs, and not to a stranger.¹ After being thus reserved, it may be sold or assigned by contract, separate from the reversion, as will be more fully explained hereafter.² When such a rent is reserved generally, without specifying to whom, it belongs to the lessor or grantor; and if he fail to dispose of it and it continue after his death, it passes at his death to the person who could then have taken possession of the land as its owner if the lease or grant had not been made.³

Since proceeds or arrears of rent are personal property, while the rent itself is real in nature, if an owner of rent-

1505, — thus arising from different sources and causes, may be summarized as follows. When a right of re-entry for non-payment is reserved *in any form* in the lease or grant of the land, and is not made dependent on any default of goods whereon to distrain, ejectment may be had *without any demand* when six months' rent or more is in arrear, but not before (§ 1504). When the lease or grant contains a clause of re-entry *dependent on default of goods whereon to distrain*, ejectment may be had as soon as any rent is in arrear "provided a written notice of intention to re-enter was given fifteen days before the commencement of the action," — (§ 1505). *Martin v. Rector*, 118 N. Y. 476; *Bulger v. Coyne*, 20 N. Y. App. Div. 225, 227; *Chaplin, Landl. & T.* p. 513 *et seq.* Of course the remedy under § 1505 is always available, if the instrument contain the clause relative to default of goods whereon to distrain; for, since no right of distress exists, there always is such default. *Hosford v. Ballard*, 39 N. Y. 147, 151. These principles and statutes apply in New York to all kinds of rent. But they have been used and discussed most in connection with the perpetual rents reserved on conveyances of the land in fee, because in the more ordinary relation of landlord and tenant summary proceedings afford a much quicker remedy. Code Civ. Pro. §§ 2231-2265. Such proceedings do not apply to cases of perpetual rents. See notes on New York Manor Lands at the end of Ch. XVII., *infra*.

¹ Lit. § 346; Gilbert, Rents, 61; *Ege v. Ege*, 5 Watts (Pa.), 134, 138; *Ryerson v. Quackenbush*, 26 N. J. L. 236.

² § 106, *infra*.

³ 3 Cruise Dig. p. * 278. If, in the reservation, the words "during the term," or their equivalent be used, the rent passes, at the death of the owner of the land, to those who succeed to the reversion; but if no such words be used, or the reservation be to the lessor or grantor and his executors, administra-

tors, or assigns, or to any combination of these, the common-law rule is that the rent shall cease at the time of the death of the grantor or lessor. Gilbert, Rents, 65 *et seq.*; Bac. Abr. Rent (H); 2 Th. Co. Lit. 413, n. (K). When rent is reserved otherwise than by deed to joint tenants, it accrues to all, thus following the reversion; but when the lease is by deed of indenture, the parties are estopped from claiming the rent otherwise than according to the deed. Gilbert, Rents, 63.

service die after an instalment of the proceeds has become due, it is payable to his personal representatives; but an instalment which is not due at that time is payable, when it does mature, to him who has the reversion at the time of such maturity. Hence, if the lessor owned the land in fee simple, a payment falling due after his death would belong to his heir or devisee, together with the reversion; while if the lessor himself had only an estate for years and sub-let the same reserving a rent-service, such payment so falling due must be made to his personal representatives, since they acquire the reversion in the term of years.¹

§ 106. **Assignment or Transfer of Rent-service.** — Since rent-service is *incident* to the reversion, it passes upon a sale of the latter, unless a contrary intention is expressed.² But the reverse of this is not true; i. e., a sale of the rent alone — the incident — does not by implication carry with it the reversion — the principal.³ Hence, if a landlord sell and convey the demised premises subject to the lease, the purchaser acquires thereby, in the absence of special agreement to the contrary, the right to the periodical payments to be made by the tenant. But when the landlord simply sells the right to those periodical payments, i. e. the rent, he retains the ownership of the reversion. Thus, he may sell the rent and retain the reversion, or sell the reversion and retain the rent; but in order to do the latter he must clearly express his intention to that effect. And, when he sells both rent and reversion, he may either do so in explicit terms, or expressly sell the latter and let the law pass the former with it as incident.⁴ It must be added that, at common law, whenever by any such transactions the rent and the reversion come into different hands, the former ceases to be rent-service (because it ceases to be incident to the reversion) and becomes rent-seck.⁵

¹ Gilbert, Rents, 66, 67; Bac. Abr. Rent (H).

² Walker's Case, 3 Co. 22; Butt v. Ellett, 86 U. S. (19 Wall.) 544, 547; Van Rensselaer v. Gallup, 5 Denio (N. Y.), 454; Stover v. Chasse, 6 N. Y. Misc. 394; Farley v. Craig, 11 N. J. L. 262; Dixon v. Nicolls, 39 Ill. 372; Steed v. Hinson, 76 Ala. 298.

³ Ards v. Watkins, Cro. Eliz. 637; Childs v. Clark, 3 Barb. Ch. (N. Y.) 52; Bennett v. Austin, 81 N. Y. 308; Pfaff v. Golden, 126 Mass. 402.

* Bennett v. Austin, 81 N. Y. 308; Moffatt v. Smith, 4 N. Y. 126; Demarest v. Willard, 8 Cow. (N. Y.) 206; Beal v. Boston Spring Car Co., 125 Mass. 157; Damren v. Amer. L. & P. Co., 91 Me. 334; Crosby v. Loop, 13 Ill. 625; Co. Lit. 143 a.

⁵ Lit. § 225; Co. Lit. 151; 2 Min. Inst. 40; Farley v. Craig, 15 N. J. L. 192; Demarest v. Willard, 8 Cow. (N. Y.) 206, 209.

§ 107. **Discharge, Suspension, and Apportionment of Rent-service.** — Rent-service has always been favored by the common law, both because it was a natural and ordinary incident of tenure between lord and vassal or landlord and tenant and because, by bringing new tenants upon the land, it afforded additional strength and protection to the kingdom. Hence, if any change occur in the number or relation of the parties interested in the land, the rent may be readily extinguished or suspended, in whole or in part, or apportioned among those who are fairly entitled to participate in its fruits. The causes for its discharge or suspension will be first examined and then its apportionment, both as to persons and as to time, will be considered.

§ 108. **Discharge of Rent-service.** — When the tenant has been evicted from all the leased property, that is when he has been put out of possession either by the act of the landlord or by some one claiming under the landlord or by the owner of a paramount title, the rent is discharged.¹ When he has been evicted from a portion only of the property let to him and has retained possession of the residue, the rent is often discharged only *pro tanto*, while it continues for the part, if any, which he retains. In this case, however, if the partial eviction be due to the wrong or negligence of the landlord or of those claiming through him, the tenant may stand upon the principle of entirety of contract and insist on a suspension of the entire rent so long as he is thus deprived of any portion of the premises.² In all cases of eviction, the tenant is liable to the payment of the arrears of rent which became due before the eviction, for the obligation continues as long as the consideration.³

¹ *Ascough's Case*, 9 Co. Rep. 134, 135; *Smith v. Raleigh*, 3 Camp. 513; *Lawrence v. French*, 25 Wend. (N. Y.) 443; *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727; *Presby v. Benjamin*, 169 N. Y. 377; *Sully v. Schmitt*, 147 N. Y. 248; *Brown v. Holyoke W. P. Co.*, 152 Mass. 463; *Hoeveler v. Flemming*, 91 Pa. St. 322; *Cheairs v. Coats*, 77 Miss. 846; *Warren v. Wagner*, 75 Ala. 188; *Gilbert, Rents*, 145. Sometimes this is spoken of as a suspension of the rent, because, if the tenant regain his possession during the term, the rent revives from that time. But, being once wholly

evicted, he need not retake possession, though it become possible for him to do so. He may, and generally does, let the eviction extinguish the rent. *Ibid.*

² *Smith v. Malings*, Cro. Jac. 160; *Blair v. Claxton*, 18 N. Y. 529; *Christopher v. Austin*, 11 N. Y. 216; *Edgerton v. Page*, 20 N. Y. 281; *Fillebrown v. Hoar*, 124 Mass. 580; *Dolton v. Sickel*, 49 Atl. Rep. 679 (N. J. Sup.); *Warren v. Wagner*, 75 Ala. 188; 2 *Taylor, Landl. & T.* 649.

³ *Ibid.*; *Greenl. Cruise Dig. tit. xxviii. ch. iii. § 2*; *O'Brien v. Smith*, 13 N. Y. Supp. 408; *Johnson v. Barg*,

Again, the landlord may release the rent-service to the tenant, or purchase the term, and thus do away with the rent; or, by purchasing the property out of which the rent issues, the tenant may unite the two ownerships and thus cause the rent to cease. Whenever the rent and the property out of which it proceeds thus come into the same hands, at the same time and in the same right, the rent is said to be *extinguished*; ¹ and sometimes this result is loosely but inaccurately styled a merger of the rent. ²

§ 109. **Suspension of Rent-service.** — Whenever the coming together of the rent and the property which produces it is not absolute, but either conditional or for a portion of the estate only, the rent may be merely suspended for a time and not discharged or extinguished. Thus, if the landlord purchase the tenant's interest on condition and the condition be broken so that the term returns to the tenant, or if having leased the land for ten years the landlord buy it back for five years, while he so holds it the rent is suspended but revives again upon the return of the land to the tenant. ³

§ 110. **Apportionment of Rent-service.** — The common law has always favored the apportionment of rent-service among the different *persons* who were *at the same time* fairly entitled to its proceeds. But it never permitted such division of any instalment of its proceeds between two *successive* owners of the land from which the rent issued. ⁴ Accordingly, when the owner of the reversion of a piece of land, from which rent is issuing as against the tenant, sells it in distinct parcels to two or more persons, each purchaser thereby becomes

8 N. Y. Misc. 307. The effects on rent-service, produced by the different forms of eviction, will be more fully discussed in dealing with the law of landlord and tenant.

¹ Greenl. Cruise Dig. tit. xxviii. ch. iii. §§ 5, 6; 3 Preston, Conv. 201; Stephens v. Bridges, 6 Madd. 66; Carroll v. Ballance, 26 Ill. 9. But not, if only part of one interest pass to the other owner. Martin v. Tobin, 123 Mass. 85.

² Technically and accurately speaking, merger applies only to the absorption of one *estate* by another in the *same* property; as when the owner of an estate in fee simple in an acre of land buys up a life estate in the same

acre and thus causes the latter to be *merged* or swallowed up by the former. Extinguishment is the absorption of one *kind* of property by another, and is illustrated by the destruction of rent in this way when the owner of the rent purchase the land or by the extinguishment of a mortgage when the mortgagee buys up the mortgaged premises. Bouvier's Law Dict., "Extinguishment."

³ Gilbert, Rents, 150; Greenl. Cruise Dig. tit. xxviii. ch. iii. § 2, n.; 2 Leake, 407; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Martin v. Tobin, 123 Mass. 85.

⁴ Greenl. Cruise Dig. tit. xxviii. ch. iii. §§ 28-43.

entitled to a share of the rent proportionate to the piece of land that he buys;¹ and, if the owner of leased property devise it to several persons, or upon his death intestate it descend to two or more individuals as his heirs, each becomes in like manner the owner of his *pro rata* share of the rent.² So, when the tenant purchases a part of the land from his landlord, or otherwise acquires it, or the landlord buys back for his own use a part of the land which he has leased, or such part descends upon or is devised or otherwise passed to him, the rent is in like manner divided and continues to issue ratably only out of that portion of the property which still remains leased.³ A single exception to this principle arises when the services or proceeds of the rent are indivisible, as when, for example, for the use of the land the tenant is to deliver a horse to his landlord on the first day of each and every month. In that case, if the landlord buy back a portion of the leased property or distribute his reversion, or let it be distributed by operation of law, among several persons, the rent ceases; while if the tenant sell and assign separate portions of the land to strangers, the rent is multiplied and the landlord may obtain as many horses each month as he thus has tenants.⁴ These anomalous results may, of course, be prevented by express agreements or arrangements among the parties.

On the other hand, rent-service is never apportioned *as to time*, by the common law; i. e., it is never divided between successive owners of the reversion so that each can claim a share of an entire payment to be made by the tenant.⁵ Therefore, when one who owns a rent-service for his life dies during the period for which the rent is running, as during the quarter, month, or week, and before the instalment of income for that period becomes due and payable, the proceeds are

¹ *Moodle v. Garnance*, 3 Bulst. 153; *West v. Lassels*, Cro. Eliz. 851; *Bliss v. Collins*, 5 Barn. & Ald. 876; *Rivis v. Watson*, 5 M. & W. 255; *Ehrman v. Mayer*, 57 Md. 612; *Greenl. Cruise Dig. tit. xxviii. ch. iii. §§ 28-31*. See *Church v. Seeley*, 110 N. Y. 457.

² *Ards v. Watkins*, Cro. Eliz. 637, 651; *Campbell's Case*, 1 Roll. Abr. 237; *Moody v. Garnon*, 3 Bulst. 153; *Linton v. Hart*, 25 Pa. St. 193.

³ *Lit. § 222*; *Gilbert, Rents*, 125;

Bliss v. Collins, 8 Barn. & Ald. 876; *Worthington v. Cooke*, 56 Md. 51.

⁴ *Lit. § 222*; 1 *Inst.* 149 a, b; *Gilbert, Rents*, 165-167; *Talbot's Case*, 8 Co. Rep. 102 b, 104.

⁵ *Jenner v. Morgan*, 1 P. Wms. 392; *Clun's Case*, 10 Co. Rep. 127 a. Unlike interest, such rent is not regarded as accruing from day to day, but it all accrues and becomes due on the day fixed for payment.

never apportioned by the common law for that period; and neither his heirs nor his personal representatives are entitled to any part thereof.¹ If under such circumstances the rent cease at his death—as when the owner of land for life leases it and dies during the time designated for the lease to run, thus terminating both the lease and the rent—the common law does not permit any one to recover the proceeds for any portion of the period then unexpired and the tenant is accordingly released to that extent;² while, if the rent continue notwithstanding the life-tenant's death—as when the lease was granted by the owner in fee who subsequently conveyed the reversion to such life-tenant for the latter's life—the instalments of proceeds for the period which was running and unexpired when such life-tenant died, is all given by the common law to the succeeding owner of the rent.³ This defect in the common law has been removed by statutes in England,⁴ and generally in the United States;⁵ so that now rent-service is apportionable, both as to persons and as to time; and, on the death of a life-owner of a reversion, his personal representatives are thus made entitled to such proportion of the payment for the period in which he died as the time during which he lived in that period bears to that entire period. (a)

(a) In New York, the statute 2 Geo. II. ch. 19, § 15 was practically copied and enacted in 1788 (2 Jones & Var. 241, § 27), and passed into the Revised Laws of 1813 (1 R. L. 143) and into the Revised Statutes of 1830 (1 R. S. 747, § 22). That act, as it is finally worded in the Revision of 1896 (L. 1896, ch. 547, § 192), provides that: "Where a tenant for life, who shall have demised the real property, dies before the first rent day, or between two rent days, his executor or administrator may recover the proportion of rent which accrued to him before his death." It having been held in *Marshall v. Moseley*, 21 N. Y. 280, that this act, like that of 2 Geo. II. ch. 19, § 15 from which it came, did not correct the difficulty in cases where the leases had been made by persons other than the life-owners, the statute, ch. 542, L. 1875, which is now in substance Code Civ.

¹ Last preceding note; *Marshall v. Moseley*, 21 N. Y. 280; *Watson v. Penn*, 108 Ind. 21, 23; *Sohier v. Eldredge*, 103 Mass. 345.

² *Jenner v. Morgan*, 1 P. Wms. 392; *Ex parte Cook*, 2 P. Wms. 501; *Wood v. Partridge*, 11 Mass. 488, 493; *Marshall v. Moseley*, 21 N. Y. 280, 281.

³ *Ibid.*; *Ex parte Smyth*, 1 Swanst. 337; *Greenl. Cruise Dig. tit. xxviii. ch. iii. § 44*; *Woodfall, Landl. & T.* 248. "Being recoverable only in a single

sum, and not until the prescribed day of payment, the common law gives it" (the income) "to him who is the reversioner at the time, and no case can be found where a court of equity has adopted a different rule." *Marshall v. Moseley*, 21 N. Y. 280, 282.

⁴ 2 Geo. II. ch. 19, § 15; 4 Wm. IV. ch. 22; 33 & 34 Vict. ch. 35.

⁵ 1 Stim. Amer. Stat. L. §§ 2027, 2028.

§ 111. **Effects of Destruction of Buildings, or Injury to them.** — A destruction of the leased premises or an injury to them, by any cause not traceable to wrong or neglect on the part of the landlord, does not, at common law, have any effect on rent-service.¹ This also has been remedied in many states, by statutes which enable the tenant to terminate the rent and lease by removing from the premises after the building or buildings have been destroyed without any fault on his part.² (a)

b, c. Rent-charge, Rent-seck.

§ 112. **Rent-charge — Rent-seck — Definitions and Distinctions.** — It has always been found convenient, as in the rais-

Pro. § 2720, swept away all the objectionable features of the common law and made rents wholly apportionable as to time. See also L. 1896, ch. 547, §§ 191, 193.

(a) In New York the statute, which was first enacted as L. 1860, ch. 345, and is now L. 1896, ch. 547, § 197, provides that: "Where any building, which is leased or occupied, is destroyed or so injured by the elements, or any other cause as to be untenable, and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession of the leasehold premises, and of the land so leased or occupied; and he is not liable to pay to the lessor or owner rent for the time subsequent to the surrender." The tenancy ceases with such destruction of the premises, unless the tenant elect to remain and retain possession. Such election may be shown by a continued retention of any part of the premises. *Decker v. Morton*, 31 App. Div. 469. But merely retaining possession for a short time, in order to remove debris and the carcasses of burned animals, as required by the board of health, will not show an election to remain as tenant. *Fleischman v. Toplitz*, 134 N. Y. 349; *N. Y. R. E. & B. I. Co. v. Motley*, 143 N. Y. 156. See *Craig v. Butler*, 83 Hun, 286. The landlord can recover all rent *due* at the time of such destruction. *Craig v. Butler*, 156 N. Y. 672, affirming 83 Hun, 286; *Werner v. Padula*, 49 App. Div. 135. The statute means physical destruction, and does not include such unfitness for occupancy as is caused by small-pox in the house. *Majestic Hotel v. Eyre*, 53 App. Div. 273. See also *May v. Gillis*, 53 N. Y. App. Div. 393. The tenant may waive this statute, by express terms in the lease; but unless there is a clear waiver the statute will operate. *May v. Gillis*, 169 N. Y. 330. See *Werner v. Padula*, 49 N. Y. App. Div. 135, 138, *aff'd* 167 N. Y. 611.

¹ *Paradine v. Jane*, Aley, 26; *Teller v. Boyle*, 132 Pa. St. 56; *Murray v. Albertson*, 50 N. J. L. 167; *Greenl. Cruise Dig. tit. xxviii. ch. iii. § 9*; 1 *Taylor, Landl. & T. § 372*.

² 1 *Stim. Amer. Stat. L. § 2062*; *Green v. Redding*, 92 Cal. 548; *May v.*

Gillis, 169 N. Y. 330. And thus also the tenant is enabled to recover back any part of payments in advance due and made before the destruction of the building. *Werner v. Padula*, 49 N. Y. App. Div. 135, 138, *aff'd* 167 N. Y. 611.

ing of marriage portions and other settlements, for the owner of real property to grant out of it and charge upon it the right to certain periodical payments, while he himself retained his entire original estate in the land upon which such right was charged. The species of incorporeal property thus created resembled rent-service in many respects, and in process of time came to be also denominated rents. They have been called *improper* rents, by a careful writer, because they are not in return for any land that passes.¹ Such charges of regular payments or returns upon realty may be made, however, either by retaining the land and granting the rent, or by granting the land and creating against it and specifically charging upon it a rent in favor of the grantor.² But such rent, whether made in conveying the land or on retaining it, is created as a distinct and separate entity and *is not incident to any reversion*. Rent which is incident to a reversion must be rent-service; and when rent is owned independent of any reversionary interest — held as a distinct thing, not connected with any other right or ownership in the land out of which it issues — it is not rent-service.³

When rent is thus specifically charged upon land and not made incident to a reversion, there is never any distress annexed to it by the law *as of common right*.⁴ And, therefore, if the parties desire to have the right to distrain as incident to such rent, they must specifically create and reserve that

¹ "The important discrimination to be here made is between rents proper — that is, rents reserved — on the one side, and rents improper — that is, rents granted — on the other. Rents proper, or rents reserved, are rents reserved upon a grant of lands. . . . A rent improper, or rent granted, is where a certain sum is granted, payable periodically, issuing out of the grantor's lands. . . . This distinction between rents reserved and rents granted is incomparably the most important connected with the subject, and affords a clue which, in general, suffices to guide the student through whatever intricacies belong to it." 2 Minn. Inst. 35.

² Langford v. Selmes, 3 Kay & J. 220, 229; — v. Cooper, 2 Wils. 375; Greenl. Cruise Dig. tit. xxviii. ch. i. §§ 6, 7.

³ Therefore, in this country, wherever the statute of *quia emptores* is in force the grantor of an estate in fee simple can not now reserve a rent-service to himself, because he can keep no reversionary interest to which it can be incident; but where that statute has not been adopted such a grantor may retain for himself a rent-service out of the land. Van Rensselaer v. Chadwick, 22 N. Y. 32; Delancey v. Piepgras, 138 N. Y. 26, 39; Ingersoll v. Sergeant, 1 Whart. (Pa.) 337; Wallace v. Harnstad, 44 Pa. St. 492. See also § 102, *supra*.

⁴ Lit. §§ 218, 225–228; 2 Blackst. Com. p. *42; Cornell v. Lamb, 2 Cow. (N. Y.) 652, 659; Farley v. Craig, 15 N. J. L. 192.

right by their own contract or convention.¹ When this is done, the rent so charged on the land is a *rent-charge*; otherwise it is a *rent-seck*.² Since only corporeal hereditaments can be distrained upon, it is apparent also that rent-charge must be made to issue out of land. Hence, a rent-charge may be defined as the right to a certain profit issuing periodically out of lands (or tenements corporeal), which is not incident to any reversion and to secure which, usually by the terms of the grant and never as of common right, the land is specially charged with a right of distress. And a rent-seck may be described as a right to a certain profit issuing periodically out of lands or tenements, which is not incident to any reversion and to secure which there is no right of distress. Since these two classes of rents are so nearly identical — differing only in respect to one kind of remedy, distress — they will be here treated of together. In states like New York, Minnesota, and Wisconsin, where all distress for rent of every kind has been abolished,³ there is no difference whatever between them; or, more accurately speaking, rent-charge no longer exists in such states, and only rent-seck and rent-service remain.

These two species of rent are sometimes spoken of together as *fee-farm* rents. They are substantially such, when made to continue in perpetuity. But the term *fee-farm* rent was used in a somewhat different sense in the early common law (to denote a rent-service reserved on a conveyance in fee); and it is also essentially misleading as intended to embrace all rents-charge and rents-seck, for in these rents interests less than fees may be readily created.⁴

§ 113. **General Characteristics of Rent-charge and Rent-seck.** — These rents are never incident to any reversion. They stand out distinct from the lands or tenements out of which they issue and may be dealt with as separate entities. Hence the statute of *quia emptores* did not in any way interfere with the granting or reserving of them in fee simple. They do not

¹ Last preceding note. By the statute 4 Geo. II. ch. 28, § 5, the right of distress was given in England for all rents. See § 104, *supra*.

² 2 Blackst. Com. p. *42; Cornell v. Lamb, 2 Cow. (N. Y.) 652, 659. Rent-seck means dry rent, *redditus siccus* — not having the sap of distress.

³ 1 Stim. Amer. Stat. L. § 2031; § 104, *supra*.

⁴ "A non-tenorial rent often comes into being by virtue of a grant. The holder of land imposes such a rent upon his land in favor of some other person. It may be a rent for life or a rent in fee." 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 130.

presuppose any tenure or fealty between the owner of the land and the owner of the rent; and so they may exist in the same forms and with the same effects where the feudal system has been abolished as in those countries where the theory or practice of that system still remains.¹(a) They and all their incidents are, in fine, the result of express contract or covenant between the parties; and, except in so far as statutes have interfered with them, they always have been and still are just what the parties to the covenants have made them by the words which they have employed. Rents of this character are not very common in the United States; but the reasons which have caused them to be extensively used in England,²

(a) The operation of the feudal system on the manor lands of New York and the general way in which rent was reserved and retained in connection with the manors are explained hereafter. Note at end of Ch. XVII. There has been much discussion, as to the nature of the rents which that manorial system employed, and as to the remedies and rights connected with those rents. The lands were let out in fee, by the owners (many of whom were called patroons) who held under the king, and perpetual rents were reserved to such owners. These were rents-service; because, although the statute of *quia emptores* has always operated in New York, yet it was impliedly waived by the king in favor of these perpetual leases. *Van Rensselaer v. Hayes*, 19 N. Y. 68, 71; *Delancey v. Piepgras*, 138 N. Y. 26, 39. The abolition of all tenure (in 1830) made such rents in substance *rents-charge* (at least as to all such rents subsequently created); and when distress was taken away (in 1846) they became *rents-seck*. But it has been clearly held, at first by virtue of the statute, L. 1805, ch. 98, and, after the repeal of that act in so far as it affected such leases in fee (L. 1860, ch. 396), as a principle which had always existed independent of statute, that these perpetual rents run with the land and bind the heirs and assigns of the original covenantors and can be enforced against them in substantially the same manner as other rents. *Van Rensselaer v. Read*, 26 N. Y. 558, 564; *Cent. Bk. v. Heydorn*, 48 N. Y. 260; *Hunter v. Hunter*, 17 Barb. 25; *Delancey v. Piepgras*, 138 N. Y. 26; note at end of Ch. XVII., *infra*. The non-payment of rent under any such lease, for twenty years, is now made presumptive evidence of a release of the rents and reversions to the owner of the fee. See L. 1900, ch. 227, which also provides for a procedure for the establishment of such a release.

¹ They are "non-tenorial." "The tenorial rent was a *redditus*; to use a term which comes into use somewhat late in the day, it was 'rent-service.' But there were other rents; we may call them 'non-tenorial,' there being no technical term which covers them all. These non-tenorial rents fell into two classes, for each of which in course of time lawyers invent a name. If the

non-tenorial rent can be exacted by distress, it is a *rent-charge*; if not, it is a *rent-seck*, *redditus siccus*, or dry rent." ² Poll. & Mait. Hist. Eng. L. (2d ed.) p. 129.

² For recent instances of them in England, see *Pertwee v. Townsend* (1896), 2 Q. B. 129; *Charity Com'rs v. Green* (1896), 2 Ch. 811; *Blackburne v. Hope-Edwardes* (1901), 1 Ch. 419.

such as marriage settlements, settlements in lieu of dower and the raising of portions for children, *may* operate here; and, with the exception of some restrictions upon the forms of remedy, there is nothing in our law inconsistent with their more general use. (a)

§ 114. Remedies for enforcing Rent-charge and Rent-seck and recovering their Fruits or Proceeds. — Since the common law connects no distress, as of common right, with these rents, if the owner desire to have this remedy he must expressly reserve it by his contract; and, as has been before said, if he do so, the rent is thereby made rent-charge. In England, this remedy as matter of right, has been extended by several statutes to what were formerly rents-seck and also to rents-charge.¹ The same has been done in some of the states of this country; while in others, as was above pointed out, all distress for rent of every kind has been abolished.²

Whether any right of distress exist or not, he to whom the payment of the profits is due may have an action at law to recover the same from the holder of the property out of which they are payable. He may also generally, by virtue of the contract itself, enter upon the premises and either defeat the title of the holder thereof as for breach of condition, or hold the property until its income pays the amount due.³ The latter is the remedy most commonly provided for in the contract.⁴ The form of action, when one is brought, and the

(a) The Constitution of New York (1891), Art. I. § 13, provides that, "No lease or grant of agricultural land, for a longer period than twelve years, in which shall be reserved any rent or services of any kind, shall be valid." See *Mass. Nat. Bk. v. Shinn*, 163 N. Y. 360; *Stephens v. Reynolds*, 6 N. Y. 454; *Parsell v. Stryker*, 41 N. Y. 480; *Clark v. Barnes*, 76 N. Y. 301; *Parish v. Rogers*, 20 N. Y. App. Div. 279. But there is no prohibition against the making of a perpetual rent-seck, issuing out of other kinds of real property. *Hawley v. James*, 19 Wend. 61, 154; *Hunter v. Hunter*, 17 Barb. 25; *Van Rensselaer v. Platner*, 2 Johns. Cas. 24; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Cent. Bk. v. Heydorn*, 48 N. Y. 260; *Bradt v. Church*, 110 N. Y. 537; *Church v. Shultes*, 4 N. Y. App. Div. 378; *Church v. Wright*, 4 N. Y. App. Div. 312.

¹ 32 Hen. VIII. ch. 37; 8 Ann. ch. 14; 4 Geo. II. ch. 28; 11 Geo. II. ch. 19; 57 Geo. III. ch. 52. See *Blackburne v. Hope-Edwardes* (1901), 1 Ch. 419.

² § 104, *supra*.

³ *Jemmott v. Cooley*, 1 Lev. 170; *Greenl. Cruise Dig. tit. xxviii. ch. i.*

§§ 70-72. If he be unable to enter peaceably, he may have ejectment.

⁴ *Ibid.* In some of the United States, the right of re-entry for non-payment of rent is given by statute, and so exists independent of any agreement by the parties. 1 *Stim. Amer. Stat. L.* § 2054.

extent of the right of entry and its effects depend upon the terms of the instrument by which the rent was created, and may also be much affected by the forms of procedure prescribed by the codes of the states in which the lands are situated. And the methods of procedure are generally made by the codes substantially the same for all kinds of rent.¹

§ 115. **Reservation of Rent-charge and Rent-seek — Assignment of them, and Transfer of the Property out of which they issue.** — The reservation of either of these forms of rent must be to one of the parties to the contract by which it is created, and not to a stranger. The payments of the proceeds are to be either to the person designated in the contract as entitled to them or to his assignee. For such rent may be freely assigned, either in whole or in part, as a distinct and independent form of property; and if the land out of which it issues be sold the purchaser takes it subject to the rent.²

A distinction has been attempted here between a rent reserved and one granted, to the effect that in case of the latter the grantee of the land out of which it was granted should not be charged with the covenant to pay the rent.³ But, in the leading case of *Van Rensselaer v. Hayes*,⁴ Denio, J. insists that the law was never so and quotes with approval the following statement of Sir Edward Sugden: "Covenants ought to be held to run in both directions, with the rent or interest carved out of or charged upon it," (the land) "in the hands of the assignee, so as to enable him to sue upon them, and with the land itself in the hands of the assignee, so as to render him liable to be sued upon them." And Judge Denio continues: "There seems to be no distinction favorable to the defendant between a perpetual rent-charge granted by the owner of the estate and a like rent reserved in fee by indenture, where the grantee covenants for himself and his assigns to pay it." And the law may now safely be said to be that, whether the rent-charge or rent-seek be granted or reserved, the assignee of the rent may recover its proceeds in a proper

¹ See these explained, § 104, *supra*.

² *Scott v. Lunt*, 32 U. S. (7 Pet.) 596; *Van Rensselaer v. Read*, 26 N. Y. 558; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Cook v. Brightly*, 46 Pa. St. 439; *Hannen v. Ewalt*, 18 Pa. St. 9; *McMurphy v. Minot*, 4 N. H. 251; *Sugden, Vend. & P.* (13th ed.) p. 483; 1 *Taylor, Landl. & T.* § 261. Some of

the English authorities are the other way. See *Milnes v. Branch*, 5 M. & S. 411; *Brewster v. Kidgill*, 12 Mod. 166; *Randall v. Rigby*, 4 M. & W. 130; *Spencer's Case*, 1 Smith's L. C. p. *68, notes.

³ *Brewster v. Kitchin*, 1 Ld. Raym. 317, 322.

⁴ 19 N. Y. 68, 90, 91.

action, and the grantee of the land becomes bound to pay them.¹

§ 116. **Discharge, Suspension, and Apportionment of Rent-charge and Rent-seck.** — Changes in the relations or interests of the parties concerned are much more apt to cause the discharge or extinguishment of rents-charge and rents-seck, than to result merely in their suspension or apportionment. This is because such rents were "against common right," and were looked upon with disfavor by the common law.²

§ 117. **Discharge of Rent-charge and Rent-seck.** — It is accordingly settled that, if the owner of either of these rents purchase the whole *or any part* of the land or tenement out of which it issues, the rent is entirely extinguished. It is regarded as an entire thing, issuing out of every part of the land, and so is not apportioned.³ So, if the owner of the rent release *any part* of the land from its burden, the whole rent is extinct.⁴ But these results may be prevented by express or necessarily implied agreements of the parties, entered into at the time of the conveyance or release. Thus, when the owner of the rent purchases a portion of the land, it may be validly stipulated in the deed that the rent shall remain upon the residue; and, when he releases a part of the land from the burden, the rest may be expressly charged in the deed of release.⁵ Such new contracts are usually treated, however, as creating *new rents*, after the discharge of the old, rather than as preserving any of the old or former rents. And the result is that the new burdens thus imposed upon the property are subordinate to all existing encumbrances which have attached to it since the creation of the original rents.⁶

¹ Last three preceding notes; Williams's App., 47 Pa. St. 283, 290; 2 Wash. R. P. (6th ed.) §§ 1200-1211.

² Greenl. Cruise Dig. tit. xxviii. ch. i § 6, 7, ch. iii, §§ 16-19.

³ Dennett v. Pass, 1 Bing. N. C. 388; Van Rensselaer v. Chadwick, 22 N. Y. 32, 33; Horner v. Dellinger, 18 Fed. Rep. 495; Ehrman v. Mayer, 57 Md. 612; 1 Co. Inst. 147 b; Gilbert, Rents, 152.

⁴ Van Rensselaer v. Chadwick, 22 N. Y. 32, 34; 1 Co. Inst. 148 a; 18 Vin. Abr. 504; 3 Vin. Abr. 10, 11. Notice the radical difference, in these respects, between such rents as these and rent-

service, which is freely apportionable as to persons, or amount. See § 110, *supra*. In England, the statute 22 & 23 Vict. ch. 35, § 10, now makes all of these rents apportionable when the owner of the rent releases a part of the land.

⁵ And the owner of the land may so deal with the other parties as impliedly to show his acquiescence in the apportionment. Church v. Seeley, 110 N. Y. 457; Farley v. Craig, 15 N. J. L. 192, 262; 1 Co. Inst. 147 b.

⁶ 1 Co. Inst. 147 b; Greenl. Cruise Dig. tit. xxviii. ch. iii §§ 20, 21; Van Rensselaer v. Chadwick, 22 N. Y. 32, 36.

§ 118. **Suspension of Rent-charge and Rent-seck.** — It follows, from the above discussion, that such rents as these can not be merely suspended, as can rent-service. They must either exist in their entirety or be completely extinguished. If by specific agreement the parties cause a cessation in the lien of the rent for a limited time, they are, in reality, discharging the original burden and causing a new one to arise after an interval; and it is not a suspension of any one continuous rent.¹

§ 119. **Apportionment of Rent-charge and Rent-seck.** — While the *purchase*, by the owner of such a rent, of a portion of the land out of which it issues extinguishes it entirely and so can work no apportionment, such is not the result when a part of the land *descends* to the owner of the rent. In the latter case, he passively becomes owner of some of the land by operation of law, and so the law apportions the rent and retains the *pro rata* burden upon the residue of the land.² So, it has always been held that, by *scire facias* or execution, a portion of the rent may be taken from the owner thereof, without affecting his title to the residue.³ Again, when the grantee of rent-charge or rent-seck releases a part of it to the grantor or his alienee of the land, or sells a portion of it to a stranger (to whom the tenant attorned at common law, though attornment is now generally abolished by statutes), an apportionment takes place and the holder of the land must pay the proceeds of the rent *pro rata* to the respective owners.⁴ Objections were at one time strenuously urged against such apportionment of rent of any kind, on the ground that it might result in exposing the tenant to several suits or distresses for a thing which was originally entire. But the obvious answer has always been recognized as sufficient, that he may avoid such inconveniences by promptly making the returns or payments when they become due.⁵

What is said above, regarding the apportionment of rent-service *as to time*, applies also to rent-charge and rent-seck.

¹ Last preceding note.

² Lit. § 224, and Gilbert, Rents, 155, 156, both cited by Denio, J., in *Van Rensselaer v. Chadwick*, 22 N. Y. 32, 34, 35; *Cruger v. McLaury*, 41 N. Y. 219.

³ *Wotten v. Shirt*, Cro. Eliz. 742;

Gilbert, Rents, 165; *Cook v. Brightly*, 46 Pa. St. 439, 440.

⁴ *Rives v. Watson*, 5 M. & W. 255; *Farley v. Craig*, 15 N. J. L. 192, 262; *Greenl. Cruise Dig. tit. xxviii. ch. iii. § 23.*

⁵ *Wotten v. Shirt*, Cro. Eliz. 742; Gilbert, Rents, 164.

It was not permitted by the common law; but now, in England and most of the United States, rents of all kinds, annuities, dividends, and payments of every description becoming due at fixed periods are made, by statutes, apportionable among the various owners according to the times of their respective ownerships in the periods for which the payments are made.¹

¹ § 110, *supra*.

CHAPTER VIII.

(2) FRANCHISES.

- § 120. Franchise — Definition.
- § 121. Franchises, general and special.
- § 122. Purposes for which franchises exist.

§ 123. How franchises may be acquired.

§ 124. No franchise right obtained by implication.

§ 125. How franchises may be lost or destroyed.

§ 120. **Franchise — Definition.** — A franchise is a special privilege, which is conferred by the government on an individual or corporation and which does not belong to the citizens of the country generally by common right.¹ It is treated by the English law as a branch of the king's prerogative, subsisting in the hands of a subject;² and in both that country and this it has generally been classed as real property — an incorporeal hereditament.³ On both sides of the Atlantic, however, there are many instances of franchises, which are property but not hereditaments, and which, if partaking of

¹ *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519, 595; *Ashley v. Ryan*, 153 U. S. 436, 441; *Curtis v. Leavitt*, 15 N. Y. 9, 170; *Fietsam v. Hay*, 122 Ill. 293; *Bridgeport v. N. Y. & N. H. R. Co.*, 36 Conn. 255.

² *Reg. v. County Court Judge* (1891), 1 Q. B. 792, 2 Q. B. 263; 2 Blackst. Com. p. *37; Greenl. Cruise Dig. tit. xxvii. § 1.

³ 2 Blackst. Com. p. *37; *Reg. v. Cambrian R. Co.*, 6 Q. B. 427; *Louisville Ferry Co. v. Kentucky*, 188 U. S. 385, 394; *Smith v. New York*, 68 N. Y. 552, 555; *Lumberville D. B. Co. v. Assessors*, 55 N. J. L. 529, 537; *Sellers v. Union L. Co.*, 39 Wis. 525, 527; *Spring Val. W. Works v. Schottler*, 62 Cal. 69, 110. The historical reason for treating franchises as real property is doubtless

in the fact that they were at first uniformly exercisable only within the limits of lands belonging to their owners, and so were readily regarded in very much the same way as the lands. "For the popular mind these things are things. The lawyer's business is not to make them things, but to point out that they are incorporeal. The layman who wishes to convey the advowson of a church will say that he conveys the church; it is for Bracton to explain to him that what he means to transfer is not that structure of wood and stone which belongs to God and the saints, but a thing incorporeal, as incorporeal as his own soul or the *anima mundi*." 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 124.

the nature of real property at all, must be mere chattels real. Such are special privileges granted to corporations, to continue for a term of years only and then to terminate. Such things could not descend from ancestor to heir, even if they were to become the property of a natural person. Upon his death, they must pass to his executors or administrators, to be applied and distributed as personal property.¹ But, of course, the great mass of franchises, which are granted in perpetuity, are real property and incorporeal hereditaments.² It is to be added that this legal use of the word "franchise" must not be confounded with its political use, in which it denotes the right to vote at a public election.

§ 121. **Franchises, general and special.** — With respect to their nature, franchises have been divided into two classes — general and special. A general franchise simply authorizes the carrying on of some kind of business or work, or creates a corporation for such a purpose; while a special franchise adds to the privileges thus conferred some peculiar or particular right. "The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the state. The general franchise of a street railroad, for instance, is the special privilege conferred by the state upon a certain number of persons known as the corporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions. Such a franchise, however, gives the corporation no right to do anything in the public highway without special authority from the state, or some municipal officer or body acting under its authority. When a right of way over a public street is granted to such a corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a *special* franchise, or the right to do something in

¹ Lippencott v. Allander, 27 Iowa, 460; State v. Ga. Med. Soc., 38 Ga. 608, 626. See Price v. Price, 6 Dana (Ky.), 107; 3 Kent Com. p. *459.

² Ibid. See People ex rel. Met. St. R. Co. v. Tax Com'rs, 174 N. Y. 417, 439, which is explained in the next section, § 121, *infra*. A franchise conferred upon an individual or a corporation must also be distinguished from a mere power given by law to a corporate being. Thus, the right to be a corporation is

always a franchise. But a right, conferred upon a corporation by its charter, to carry on a business or to do acts which the citizens of the state may do or carry on as of common right, is not a franchise, but merely a corporate power. See State v. Minn. Threshing Mfg. Co., 40 Minn. 213, 225; Peter v. Kendal, 6 B. & C. 703; Middlebury Bank v. Edgerton, 30 Vt. 182, 190.

the public highway, which, except for the grant, would be a trespass."¹

§ 122. **Purposes for which Franchises exist.** — Franchises have been held in England for a great variety of purposes, which are not recognized in this country. Such are rights to hold a court, to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures and deodands, and many such privileges peculiar to the English system of government.² In the United States, also, the purpose and objects for which they may be granted are not restricted; but those of most importance are the rights to build and maintain ferries, bridges, railroads, and turnpike roads and the right to be a corporation.³ The last-named franchise is, of course, the one most extensively employed; and it is as multifarious in its aspects as the forms which the ingenuity of man is permitted to give to corporations.⁴

¹ *People ex rel. Met. St. R. Co. v. Tax Com'rs*, 174 N. Y. 417, 435. It was held in that case that both kinds of franchises are taxable by the state as *property*. But Vann, J., adds, in speaking of the special franchises, brought under the tax law by statute: "The new property is real estate in name, but not in reality, for it is a mere privilege to do something in public streets and places not permitted to citizens generally," p. 439. See *State v. Minn. Threshing Mfg. Co.*, 40 Minn. 225; *E. L. S. Orphans' Home v. Buffalo Hydraulic Assoc.*, 64 N. Y. 561.

² 2 Blackst. Com. p. *37. "The realm of medieval law is rich with incorporeal things." 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 124.

³ The question as to what is a ferry has led to some interesting discussion. "It is impossible, in a general way," says the New York Court of Appeals, "to specify to what distance over intervening waters ferries may be operated. A ferry could not be established between New York and Boston, or New York and Newport or Philadelphia. The distance would be too great, and the business of transporting passengers and freight between such distant places would be that of common carriers upon public waters. But when the intervening waters are not wide and can be

traversed at regular and brief intervals by boats adapted to a ferry business, there can be no question that ferries may be established and operated." Then the ferry is a continuation of the highway from one side of the stream, arm of the sea, or other body of water, to the other. *Mayor, etc. of N. Y. v. N. J. S. N. Co.*, 106 N. Y. 28, 30. It was held in this case that a company was doing a ferry business, whose boats, running from and returning to New York City, stopped at several places on Staten Island and two places in New Jersey, making a round trip of about twenty-four miles; that it was a ferry between each of those places and New York City, but was not such between the two places on the New Jersey shore, or between two places on the shore of Staten Island, since between such places the boats *did not pass over intervening waters*; but as between such places alone it was simply doing the business of a common carrier. See also *Peter v. Kendal*, 6 B. & C. 703; *Roberts v. Washburne*, 10 Minn. 23, 27; *Conway v. Taylor*, 1 Black (U. S.), 603; *Midland F. Co. v. Wilson*, 28 N. J. Eq. 537; *Collins v. Ewing*, 51 Ala. 101.

⁴ See *Memphis R. Co. v. R. R. Com'rs*, 112 U. S. 609; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 185; *Grady v. Moulton*, 61 Minn. 185;

§ 123. **How Franchises may be acquired.** — In a few instances, franchises have been acquired by prescription, and have thus been held by *presumed* grant from the state.¹ But they are generally granted by express legislative act; and these acts are either general in character, authorizing the acquisition of such rights by any corporations that may be organized and conducted in the manner specified, or they are special statutes, each providing for the giving of particular privileges to designated individuals or corporations. It is now the settled policy of most of the United States to organize corporations and confer upon them their various franchises by means of general statutes, rather than by special legislation.² (a) But a franchise, whatever may be its character, must arise from a grant of the sovereign; and it is this fact that distinguishes it from all other kinds of incorporeal property.³

§ 124. **No Franchise Rights obtained by Implication.** — The grant of a franchise, whether made as the result of a general act or by special legislation, constitutes a contract between the state and the individual or corporation. Hence, the provision of the Federal Constitution, which forbids the states to pass any law impairing the obligation of contracts, prevents it from being abrogated or materially altered by state legislation without the consent of the other party, unless the right so to do has been expressly reserved.⁴ (b) The franchise,

(a) "This is done in New York, as follows: The Legislature shall not pass a private or local bill in any of the following cases: . . . Granting to any corporation, association, or individual the right to lay down railroad tracks. Granting to any private corporation, association, or individual any exclusive privilege, immunity, or franchise whatever.

"Providing for building bridges, and chartering companies for such purposes, except on the Hudson River below Waterford, and on the East River, or over the waters forming a part of the boundaries of the State.

"The Legislature shall pass general laws providing for the cases enumerated in this section, and for all other cases which in its judgment may be provided for by general laws." N. Y. Const. (1894), Art. 3, § 18.

(b) "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where,

Attorney-General v. C. R. Co., 35 Wis. 425; Bridgeport v. N. Y. & N. H. R. Co., 36 Conn. 255, 266.

¹ 1 Co. Inst. 114 a; 9 Co. Rep. 27 b; Greenl. Cruise Dig. tit. xxvii. § 15.

² 1 Stim. Amer. Stat. L. § 441.

³ § 120, *supra*.

⁴ Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518. Many states reserve the right to alter or abolish franchises created under their general laws. 1 Stim. Amer. Stat. L. §§ 442-

moreover, constitutes a valuable right of property, which can not be directly taken or destroyed, even for public purposes by the exercise of the right of eminent domain, unless just compensation is made.¹ Thus, if a railroad or bridge company be authorized by the legislature to so construct a bridge as to occupy the place of a former ferry, or if one turnpike privilege be directly appropriated or abolished in order to make way for another, the individual or corporation whose property is thus impaired must be fully reimbursed.²

But this principle does not prevent the state from indirectly and consequentially impairing or wholly destroying the value of a franchise, by granting similar or antagonistic rights to other parties. The settled rule of constitutional law upon this matter is that public grants are to be strictly construed; and nothing passes by implication against the state in derogation of the legislative powers which are requisite to accomplish the end of their creation.³ It was, accordingly, held that the grant by statute of a franchise to the Charles River Bridge Company to construct and maintain a bridge over that river and to receive toll for a limited period for the use of the same contained no implied engagement by the State of Massachusetts, forbidding it to confer upon another corporation — The Warren Bridge Company — the right to construct another bridge over the same river, in the same line of traffic and so near to the first as to divert travel from it and thus to diminish its value.⁴ The only way in which the first corpora-

in the judgment of the legislature, the objects of the corporation can not be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." N. Y. Const. (1894), Art. 8, § 1; *Mayor v. Twenty-third St. R. Co.*, 123 N. Y. 311; *People v. O'Brien*, 111 N. Y. 1; *People ex rel. W. G. Co. v. Deehan*, 153 N. Y. 528.

447. Such reserved rights become in substance part of the contract. *Railroad Co. v. Georgia*, 98 U. S. 359; *Railroad Co. v. Maine*, 96 U. S. 499; *S. W. Mo. Light Co. v. Joplin*, 113 Fed. Rep. 817; *Inhab. of Palmyra v. Pa. R. Co.*, 62 N. J. Eq. 601.

¹ *Ibid.*

² *Ibid.*; *Central Bridge Co. v. Lowell*, 4 Gray (Mass.), 474; *Matter of Kerr*, 42 Barb. (N. Y.) 119; *N. Y. H. & N. R. Co. v. Boston & M. R. Co.*, 36 Conn.

196; *Roberts v. Washburne*, 10 Minn. 23, 28.

³ *Fanning v. Gregoire*, 57 U. S. (16 How.) 524; *Williams v. Wingo*, 177 U. S. 601; *Delancey v. Piepgras*, 138 N. Y. 26, 38.

⁴ *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420; *Tuckahoe Canal Co. v. Tuckahoe R. R. Co.*, 11 Leigh (Va.), 42; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Fall v. Sutter Co.*, 21 Cal. 237.

tion could have protected itself against such subsequent act of the legislature was by obtaining an express statutory provision to that effect.¹ And it is to be emphasized that even such an express statute could not be constitutionally sustained, if it went so far as to amount to a general abrogation by the legislature of powers entrusted to it for the public welfare.²

§ 125. **How Franchises may be lost or destroyed.** — By surrender, merger, misuser or non-user, franchises may be done away with. If the owner thereof grant or transfer the right back to the state for the purpose of having it cease to exist, the franchise as a piece of property is thereby destroyed by surrender. And, when by any means the state acquires for itself the title to such a right or privilege which it has previously granted, it merges, or is extinguished, into the general right of sovereignty.³

If the holder of a franchise misuse it, as by employing it for an illegal purpose or an object not authorized by his charter or grant, the state may take it from him for such violation of duty. When he employs it for the purposes for which it was created and also for other purposes for which he has no legal authority, and it is reasonably possible to distinguish the legal user from that which is illegal, he will be deprived of the latter only and his rightful franchise will not be forfeited; but when the two are so related or blended that the unlawful part can not be readily separated from that which

¹ Last preceding note; *Williams v. Wingo*, 177 U. S. 601.

² "Any act of the legislature, disabling itself from the future exercise of powers entrusted to it for the public good, must be void, being in effect a covenant to desert its paramount duty to the whole people. It is therefore deemed not competent for a legislature to covenant, that it will not, under any circumstances, open another avenue for the public travel within certain limits, or a certain term of time; such covenant being an alienation of sovereign powers and a violation of public duty.

"But if, in order to provide suitable public ways, the state has availed itself of private capital, and secured its reimbursement by the grant of a charter of incorporation, with the right to take tolls for a limited period; and the pub-

lic necessity should afterwards require the creation of another way, the opening of which would diminish the profits of the first, and so prevent the corporators from receiving the compensation intended to be secured to them; the state, thus sacrificing the private property of the corporation for public uses, would unquestionably be bound, as a sacred moral duty, to make full indemnity therefor, in some other mode." *Greenl. Cruise Dig. tit. xxvii. § 29*, note; *Illinois Cent. R. R. v. Illinois*, 146 U. S. 387; *Saunders v. N. Y. C. & H. R. R. Co.*, 144 N. Y. 75; *Watuppa R. Co. v. City of Fall River*, 154 Mass. 305.

³ This is called in England a destruction of the franchise "*by merger in the crown.*" *Greenl. Cruise Dig. tit. xxvii. § 16*; 1 *Crabb, Real Prop. § 731*.

is lawful, the misuser results in a forfeiture of the entire privilege.¹

So non-user, or failure of the owner to enjoy a franchise, for such a period of time as to raise a presumption that he does not intend again to exercise the right, may result in a forfeiture. Since all franchises in the United States are granted for some public utility, it is in a broad sense true that an unreasonable *non-user* is also a *misuser*, and hence, under such circumstances, the state is justified in entirely depriving the wrongdoer of his franchise.² The length of time which is sufficient to establish such a non-user must vary, of course, according to the nature of the franchise itself and the circumstances under which it is enjoyed, a very short time sufficing when the public is greatly inconvenienced, and a discontinuance of the enjoyment of the right for even many years being insufficient when the public welfare is but little affected thereby.³

¹ Thus, "where a person has a franchise to hold a market every week, on the Friday, and he holds it on the Friday and the Monday, in this case nothing shall be forfeited but that which he hath purposed. But he who has a fair to hold two days, and holds it three days, forfeits the whole." Greenl. Cruise Dig. tit. xxvii. § 21. And the reason is, manifestly, that, while in the former case the good can be separated from the bad, in the latter this can not be done,

since no one can tell on which two of the three days he legally holds the fair.

² *City of London v. Vanacre*, 12 Mod. 270, 271; *Brownell v. Old Col. R. R.*, 164 Mass. 29; Greenl. Cruise Dig. tit. xxvii. §§ 20-26.

³ *Brownell v. Old Col. R. R.*, 164 Mass. 29; *Chadwick v. Haverhill Bridge*, 2 Dane Abr. 686; *Willoughby v. Horridge*, 12 C. B. 742, 747; *Ferrel v. Woodward*, 20 Wis. 458, 461.

(3) EASEMENTS AND SERVITUDES.

CHAPTER IX.

EASEMENTS. KINDS. HOW CREATED.

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§ 126. **Easements — Definition.** — In modern law, the word “easement” is frequently employed, in a very loose sense, to denote any right or privilege which one person has over the land of another. In the early common law it was employed, with more care and precision, to describe a class of rights around which definite and logical legal principles have crystallized.¹ Not all of those principles are wholly applicable to many of the privileges and immunities which are now frequently styled easements. It, therefore, conduces to clearness of conception, and ease in understanding the kinds of incorporeal hereditaments now to be discussed, first to define and explain the strict, technical, common-law easement and then to examine those other similar, but broader and looser rights, which, for want of a better term, may be described by the generic civil-law word, *servitudes*. We may, in the first place, then, define a common-law easement as follows:

An easement is a privilege without profit (i. e., without *profit à prendre*, or the right to take anything from the land), acquired by grant or prescription, which privilege the owner of one piece of land, called the *dominant tenement*, has over another piece of land, called the *servient tenement*. “The essential qualities of easements,” says Mr. Washburn, “are these: 1st, they are incorporeal; 2d, they are imposed on corporeal property, and not upon the owner thereof; 3d, they confer no right to a participation in the profits arising from such property; 4th, they are imposed for the benefit of corporeal property; and 5th, there must be two distinct tenements, — the dominant, to which the right belongs, and the servient, upon which the obligation rests.”² And he might well have added here, as he does in other connections,³ 6th, they are always acquired, either by some form of grant, or by prescription which presupposes a grant. Illustrations of easements are: a right of way, i. e., a privilege of walking, driving, or otherwise going over another’s land; a right to drain water or have it flow over another’s soil; a right to

¹ Digby, Hist. Law R. P. (5th ed.) pp 181-191; 2 Poll. & Mait. Hist. Eng. Law (2d ed.) p. 145.

² Wash. Ease. and Serv. p. 3.

³ Wash. Ease. and Serv. pp. *7, *20, *21.

light, air, or prospect or view across neighboring property; a right to foul or pollute the air, or a stream, and many other similar privileges.

§ 127. **Analysis of Definition.** — It is to be noted, in the first place, that an easement is a privilege *without profit* — without authority to take anything from the soil or land over which the right exists. It is thus distinguished from a *profit à prendre*, or the right to take something of value, such as grass, turf, gravel, or marl from the land itself. An easement may be very valuable and produce much income or profit for its owner. But the value must consist in the mere privilege of using the land, as by walking, or driving, or looking across it, and not in the right to abstract anything from the soil of the servient tenement, or its products, or the structures or erections thereon. The right to drive from one's own land over the land of one's neighbor is an easement; but the right to let the horses graze as they go over such neighboring land, or the right to take sea-weed or ice from another's property, is a *profit à prendre*, and not an easement.¹ Again, an easement is a privilege without profit, *acquired by grant or prescription*. Since a prescriptive right rests upon the presumption of a grant, it is sometimes said, with accuracy, that all easements are obtained by grant, either express, implied, or presumed. This fact distinguishes them from mere licenses, and from those natural and customary rights which rest upon no express grant and for which no grant can be presumed. A license to one person to do an act or series of acts upon land of another is merely a permission given by parol, confers no interest in or over the land itself and is ordinarily revocable by the licensor at any time before it has been wholly executed; while an easement, being created by grant, always includes an interest in the land over which it is to be enjoyed and can be enforced by its owner even against the will of the holder of the servient tenement. Those natural rights, moreover, such as adjacent riparian proprietors along a stream or the seashore have reciprocally against each other, or adjoining owners of lands have for the lateral or subjacent support of their soil, are not, strictly speaking, easements, since they

¹ *Hill v. Lord*, 48 Me. 83, 99; *Huntingdon v. Asher*, 96 N. Y. 604; *Huff v. McCauley*, 53 Pa. St. 206, 209.

A grant of the exclusive use of land

is not an easement, since such a conveyance excludes the grantor, and is in effect a conveyance of the soil itself. *Buszard v. Capel*, 8 B. & C. 141.

exist without grant or prescription.¹ It should be added that the grant by which an easement is acquired is ordinarily private and that, even when it is public, it imposes upon the grantee no special duty or obligation to the public or any part of it; and it is this fact that distinguishes easements from franchises.²

Lastly, an easement is a privilege without profit, acquired by grant or prescription, which privilege *the owner of one piece of land, called the dominant tenement, has over another piece of land, called the servient tenement.* Not only must there be two distinct and separate pieces, but the privilege must be wholly in favor of the one and against the other as a burden. Hence, the rights to light, air, and access, which adjoining owners have in streets and highways, and the right of passing over them, which inheres in the general public, are not easements, nor are the rights of access to natural streams and the right to their uninterrupted flow in an unpolluted condition, which are owned by riparian proprietors. Such rights are servitudes, as appears hereafter; but they are not easements, since they do not require for their existence two separate and distinct tenements, the one wholly dominant and the other wholly servient.³ An easement exists for the benefit of the dominant

¹ Speaking of such rights and privileges as these, Earl, J., says, in *Scriver v. Smith*, 100 N. Y. 471, 479: "Such rights have some semblance to easements, and no harm or inconvenience can probably come from classifying them as such for some purposes. But they are not in fact real easements. Every easement is supposed to have its origin in grant or prescription, which presupposes a grant, and it is quite absurd to suppose that the owner of land, at the head of a stream, has an easement by grant or prescription for its flow over all the land of the riparian owners for many miles to its mouth. Would any of the usual covenants in a deed be violated because a natural stream of water flowed through the land, and the upper owners, therefore, had an easement in such land? Clearly not." Also *Huyck v. Andrews*, 113 N. Y. 81, 85; *Archer v. Archer*, 84 Hun (N. Y.), 297, 298.

² See § 120, *supra*.

³ The distinctions between such rights as these and easements were emphasized and applied by the New York Court of Appeals in *Stevens v. N. Y. El. R. Co.*, 130 N. Y. 95. It is a settled principle of common-law easements that if, in favor of one lot of land A have an easement over B's land, such, for example, as a right of way, and A purchase another distinct lot adjoining that in favor of which the way exists, he can use the way not for the benefit of both lots but only for that for which it originally existed. Now, in the above-cited case, M owned a lot of land fronting on the east side of Pearl Street in New York City and extending from the centre of that street half way through the block to the next street to the east — Water Street, — and in favor of such lot he enjoyed all the street rights in Pearl Street. Subsequently, he bought the adjoining lot in the rear, thus obtaining one continuous strip from the middle of Pearl Street to

owner alone, and the servient tenant acquires thereby no reciprocal rights and has no chose in action for its discontinuance. Thus, when the easement consists in the right to discharge water, in an artificial stream, over the land of another, though the water may be advantageous to the servient tenant, yet the latter acquires no right to have the flow continued, nor any right of action because the stream is subsequently diverted or entirely stopped.¹

§ 128. **Servitudes — defined and explained.** — In the civil law, the word servitude is used, in its general significance, to denote the subjection of one person or thing to another person or thing. A *personal* servitude is the subjection of one person to another; a *mixed* servitude is the subjection of a thing to a person or *vice versa*; a *real* or *prædial* servitude is a charge or burden laid on one piece of land for the use and utility of other land belonging to another proprietor.² The last-named form is employed generally to describe any such charge or burden, and its proper use by common-law writers is with the same broad signification. Hence real or prædial servitudes embrace (1) All common-law easements, as above

the middle of Water Street. After he had built a warehouse on the entire strip between those two streets, the elevated railroad was constructed on Pearl Street, and he sued the railroad company for the damages thus caused to his entire warehouse. It was contended, in behalf of the defendant, that his recovery must be limited to compensation for the damages caused by the railroad to that half of the warehouse which stood upon the lot originally owned by him and fronting on Pearl Street, and the above-stated principle as to easements was invoked in favor of this contention. But it was held that he should recover compensation for the damages to the entire structure, since the street rights invaded by the elevated structure *were not easements*, and therefore the court was not bound by the said principle above stated. Follett, J., writing the opinion, said: "The characterization of these street rights as easements and the implying that they are governed by the rules and are subject to the limitations of common-law easements tends to obscure the

rights of abutting owners on the one hand and of the corporation on the other. They may be easements, in the sense that the owner of land is sometimes said to have an easement for lateral support in adjacent land, or that the owner of land bordering on navigable waters having certain private rights to the shore is sometimes said to have an easement, but in neither case are the rights common-law easements. There is no dominant nor servient estate, and the rules applicable to easements have not generally been applied to such rights."

These rights, however, are constantly called easements by the New York Court of Appeals, as well as by the other courts generally. See *Ely v. Edison Elec. Illum. Co.*, 172 N. Y. 1; *Story v. N. Y. El. R. Co.*, 90 N. Y. 122. But, as in the *Stevens* case, when the distinction becomes material, they make it in nomenclature.

¹ *Mason v. Shrewsbury & S. R. Co.*, 6 Q. B. 578, 587; 10 Eng. Rul. Cas. 22, 30.

² *Bouvier Law Dict.*, "Servitude."

explained; (2) All forms of *profit à prendre*, or rights to take something from the land itself; and (3) All those natural, legal, and customary rights above mentioned, such as the reciprocal rights of proprietors along streams or highways, which are not common-law easements and which do not carry with them the privilege of taking anything from the land itself. For the sake of convenience, this last class of rights will be designated in the following pages simply as *servitudes*, and they will be treated of in connection with easements. A separate discussion will be devoted to the subject of *profit à prendre*.

It is to be added that the word *servitude*, as used in its general sense by the civilians and very frequently by common-law writers, looks more to the *burden* on the land than to the right or privilege. Thus, an easement is, in a liberal sense, a form of real or prædial *servitude*; but, more strictly, an easement is the privilege or right looked at from the standpoint of the owner of the dominant tenement, while from the point of view of the owner of the servient tenement it is a *servitude*.

In our discussion, then, of all those rights and privileges, which one person may have in the land of another, and the burdens which the latter must endure, there will be in reality three topics involved; namely: *First*, Easements, as above defined and explained; *Second*, Those other rights and burdens similar to easements, for which somewhat illogically but for the sake of convenience and for want of a better term the generic word "*servitudes*" will be used; and *Third*, *Profit à prendre*. The first two of these, being similar in most particulars, will be largely treated of together, but care will be taken to point out the distinctions between them as the discussion progresses. It should be said in passing that the second division properly includes a class of rights which are commonly called *easements in gross*. These are rights granted to or otherwise acquired over another's land by some individual *as such* and without regard to his ownership of any land, that is to say there is no dominant tenement, the right being attached to the *person* and not to any land whatever.

§ 129. **Classification of Easements and Servitudes.** — Easements are either *affirmative* or *negative*; and the same classification may be extended to *servitudes* generally. They are affirmative when their owner has a positive right to do some

act or series of acts upon the land on which the burden rests, as the right to pass over it, or to let water drip upon it from the eaves of his house. They are negative when they consist in the right to restrain the owner of the servient property from doing or permitting thereon that which might otherwise be lawfully done. Such are rights to prevent one from building on his own land, to restrain him from digging away his soil so as to endanger the foundations of a house standing on the dominant tenement, and to preclude him from building except in a specified manner, or from carrying on certain designated trades or kinds of business in themselves legal and permissible.¹

Again, easements are either *apparent* or *non-apparent*, which distinction practically defines itself, and which applies to other servitudes as well. A right of way, or a right to swing shutters over one's neighbor's land, is an apparent easement, since in the act of enjoying it its owner may be readily seen; while the privilege of using a hidden, underground drain through another's soil is, of course, non-apparent in character.

All easements and servitudes are also classified as *continuous* and *discontinuous*, which classes are thus defined: "Continuous are those of which the enjoyment is or may be continued, without the necessity of any actual interference by man, as a waterspout or a right of light or air. Discontinuous are those the enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water."²

Easements have been further divided into *appurtenant* (sometimes called also *appendant*), and *in gross*. An easement is appurtenant when it is for the benefit of the property of the grantee. In that case, it is an assignable right and, if it be sufficiently great in quantity, it is inheritable with the dominant tenement. Strictly and accurately speaking, all easements properly so called (i. e., all common-law easements), are appurtenant, since they are for the benefit of the

¹ All the forms of equitable easements, hereafter explained, are negative. See § 148, *infra*; also *Talmadge v. East River Bank*, 26 N. Y. 105; *Equitable Life Assur. Soc. v. Brennan*, 148 N. Y. 661.

² *Lampman v. Milks*, 21 N. Y. 505; *Durel v. Boisblanc*, 1 La. An. 407.

This classification of servitudes is made by the Code of France and is recognized and applied with important results by the common-law courts. See §§ 139, 140, *infra*.

corporeal dominant tenements upon which their existence depends.¹ It follows that the expression, "easement in gross" is a misnomer; but it is, in fact, used by judges, legal writers and the profession generally to describe a right over another's property, not appurtenant to any land, but simply belonging to its owner as an individual, i. e., where there is a servient tenement but no dominant, the right or privilege being attached to the *person* and not to any land whatever.² We may, therefore, employ the expression, but with the understanding that it denotes a servitude and not a common-law easement.³ An easement appurtenant is preferred to one in gross; and a grant or reservation will not be construed as creating the latter kind when it can reasonably be held to be for the benefit of any land of the grantee. Thus, a right of way, which leads to the grantee's land and is useful in connection with it, is appurtenant to such land, and this, although the land is not mentioned in the deed by which the way is created or transferred. So, where one conveyed to another a parcel of land; and on the same day granted to him, "his heirs and assigns, and tenants and occupiers," a right of way over a strip of ground adjoining the property already transferred to him, which way led to such property, it was held that the right of way was appurtenant to the land already conveyed.⁴

Easements and servitudes are sometimes classified as *natural, legal, customary, and conventional*. But all common-law easements are conventional, that is, they are the result of contract, or convention between the parties from which arises a grant express or implied. On the other hand many servitudes, which are not easements, exist by nature or arise by operation of law or by custom, without any contract or convention express or implied between the parties interested

¹ See *Longendyke v. Anderson*, 101 N. Y. 625, 629; *Parish v. Baird*, 160 N. Y. 302; analysis of definition of easements, § 127, *supra*.

² "It has sometimes been said that there is no such thing as an easement in gross; that a privilege not appurtenant to land is not an easement. The term 'easement in gross' is used because it is a term in general use by legal writers, by judges and by the profession; and as against such usage

of the term it is useless to attempt to establish a refinement of definition intended to do away with the term." *Jones on Easements*, § 33. See *Crippen v. Morse*, 49 N. Y. 63; *Valentine v. Schreiber*, 3 N. Y. App. Div. 235; *Metcalf v. Central Brook Park Ass'n*, 63 N. Y. App. Div. 445.

³ See servitudes, defined and explained, § 128, *supra*.

⁴ *Moll v. McCauley*, 83 Iowa, 677.

in or affected by them. Thus, a natural servitude is illustrated by the burden to which a lower field is subject, to receive the surface water which flows upon it from higher ground;¹ the obligation of the owner of the soil of a street or highway to let the public use the same, which obligation arises when the highway is created by public authority, is a sample of a legal servitude; and the burdening of pieces of land in favor of the rights of the inhabitants of certain localities or villages to dance and play games on the same have afforded a few instances of servitudes arising from custom.² These various forms of servitudes will be more fully examined in discussing the methods by which such incorporeal rights and obligations are created.

§ 130. **How Easements may be acquired.** — Easements have been defined as privileges acquired by *grant* or *prescription*. And prescription, or adverse enjoyment of some burden on another's land for the requisite length of time, may bring these rights into existence because it rests upon the presumption of a grant, which has been lost or destroyed and therefore can not be directly proved. The *grant*, then, or transfer of the right or privilege by deed, is actually or presumptively at the foundation of all common-law easements. Parol license, permission, or acquiescence can not ordinarily create or transmit them. Thus, an oral promise to allow one to send water through a drain on the promisor's land,³ or to take water from his aqueduct,⁴ or to maintain an embankment upon the premises for the benefit of the promisee,⁵ though founded upon a valuable consideration, does not at law run with the land nor create an easement therein.

In some states a parol agreement for an easement is sus-

¹ *Laumier v. Francis*, 23 Mo. 181. "The French law reckons five natural servitudes; namely, 1. The flowing of water from higher to lower land. 2. The right to a spring or fountain of water on the part of the owner on whose land it rises. 3. The right of a landowner to a watercourse flowing through or forming a boundary of his land. 4. The fixing and maintaining boundaries between lands of adjacent owners; and 5. Building and maintaining fences for separating the lands of different owners. 1 *Lepage Desgodets*, 15." Wash. Ease. p. *15.

² *Fitch v. Rawling*, 2 H. Blackst. 393; *Brakely v. Sharp*, 1 Stockt. (N. J.) 9; *Lockwood v. Wood*, 6 Q. B. 31, 66; *Day v. Savadge*, Hob. 85; *Gateward's Case*, 6 Rep. 60; *Smith v. Gatewood*, Cro. Jac. 152; *Mounsey v. Ismay*, 3 H. & Colt. 486, 492, 498.

³ *Wiseman v. Lucksinger*, 84 N. Y. 31.

⁴ *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Taylor v. Gerrish*, 59 N. H. 569, 570.

⁵ *Baghart v. Flummerfelt*, 43 N. J. L. 28.

tained in equity, when it is founded upon a valuable consideration and there has been such a part performance of the contract by the promisee as would take the case out of the statute of frauds if it were a contract for the purchase and sale of land.¹ And a very few states, such as Pennsylvania and Iowa, go even further than this and hold that a mere executory, parol license, on the faith of which the licensee has done work, incurred expense, or otherwise materially changed his position, can not be revoked at the will of the licensor alone, but becomes enforceable as an interest in the land, and, therefore, is in effect an easement.² This last doctrine, however, is *pro tanto* a repeal of the statute of frauds by the courts and is discountenanced in England and most of the United States. "A parol license to perform an act on the land of another, while it justifies anything done by the licensee before a revocation, is, nevertheless, revocable at the option of the licensor, and this although the intention was to

¹ "The doctrine that equity will interfere in some cases of oral license in order to prevent great damage arising to the licensee from the revocation of the license appears to be gaining ground. . . . The principle is that where two persons have entered into a complete, sufficient, and legal contract for a license, which contract is not only founded upon a valuable consideration, but of which the terms are defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement, equity will regard such a contract for a license as creating an easement, and will enforce the easement either by compelling the grantor to give a deed of the easement, or by restraining him from interfering with the grantee in his enjoyment of the right acquired by the contract. The terms of the contract, however, must be plain and definite. If they are indefinite, as if it is doubtful whether the license is to be for life, or at the pleasure of the grantor or otherwise, equity will not enforce the agreement, or if the evidence is too vague to establish any agreement, or if the acts of part performance are not so clear, definite, and certain in their object and design as to

point exclusively to a complete and perfect agreement, of which they are a part execution." Wash. Ease. (4th ed.) p. 29, p. *18, citing *Dempsey v. Kipp*, 61 N. Y. 462; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Wheeler v. Reynolds*, 66 N. Y. 227; *Huff v. McAuley*, 53 Pa. St. 206; *Thompson v. McElarney*, 82 Pa. St. 174; *Meek v. Breckenridge*, 29 Ohio St. 642; *Butt v. Napier*, 14 Bush (Ky.), 39; *Legg v. Horn*, 45 Conn. 409, 415; *United States v. Balt. & Ohio R. Co.*, 1 Hughes C. C. 138. See also *Veghte v. Raritan Co.*, 19 N. J. Eq. 142; *Williamston, &c. R. Co. v. Battle*, 66 N. C. 540, 546; *Jackson Co. v. Phila. W. & R. Co.*, 4 Del. Ch. 180.

² *Rerick v. Kern*, 14 S. & R. (Pa.) 267; *Wheatley v. Chrisman*, 24 Pa. St. 298; *Strickler v. Todd*, 10 S. & R. (Pa.) 63, 74; *Lacey v. Arnett*, 33 Pa. St. 169; *Campbell v. McCoy*, 31 Pa. St. 263; *Swartz v. Swartz*, 4 Pa. St. 353, 358; *Lindeman v. Lindsay*, 69 Pa. St. 93, 100; *Buchanan v. Logansport*, 71 Ind. 265; *Wickersham v. Orr*, 9 Iowa. 253, 260; *Baetty v. Gregory*, 17 Iowa, 109, 114; *Lee v. McLeod*, 12 Nev. 280; *School District v. Lindsay*, 47 Mo. App. 134; *Harlan v. Logansport Co.*, 32 N. E. Rep. 930; § 239, *infra*.

confer a continuing right and money had been expended by the licensee on the faith of the license."¹

The grant, by which an easement is created or conveyed, may be either express or implied; and, when express, it may consist, either of a grant of a right or privilege over land which is retained by the grantor, or of a reservation by him to himself or his heirs of a right or privilege over the land conveyed, which reservation is made in his deed of conveyance of the land. Adding to the three divisions of the grant of easements thus emerging the method of gaining them by prescription, we have the following four modes by which they may be acquired and transferred; namely: a. *By express grant*, where the grantor retains the land over which the right is conferred; b. *By reservation in a deed*, where the grantor parts with the land and in the deed of conveyance reserves an easement over it; c. *By implied grant*; and d. *By prescription*, which presupposes a grant. Each of these four methods and the varieties of easements to which they give rise and their characteristics and incidents will be separately discussed.

a. *Easements created by Express Grant.*

§ 131. **Express Grant of Easements.**—The nature of an easement created by express grant is to be chiefly determined, of course, by a proper construction of the language used by the parties to the instrument. The dominant and servient tenements must each be described with sufficient accuracy to be clearly identified as such, and the character and location of the right must in general be made clear by the words of the conveyance.² The privilege, being once brought into existence by deed, is presumed to be permanent, unless a contrary intention is expressed. If, for example, it be intended to make it to continue only during the life of a

¹ *Crosdale v. Lanigan*, 129 N. Y. 604; also, *Cahoon v. Bayard*, 123 N. Y. 298; *Springer v. Springer*, 49 N. J. Eq. 289; *Lake Erie R. Co. v. Kennedy*, 132 Ind. 274; *Babcock v. Utter*, 1 Abb. Ct. App. Dec. (N. Y.) 27-60. See also the subject of revocation of licenses, § 239, *infra*.

² *Brazier v. Glasspool* (1901), W. N. Cas. 237; *Crocker v. Cotting*, 181 Mass. 146; *Truax v. Gregory*, 196 Ill. 83;

Smith v. Worn, 93 Cal. 206. An easement granted by the use of vague or indefinite terms may be construed in accordance with the uniform acts of the parties in using and enduring it for many years. They are thus deemed to give a practical construction to it and so evince their intent. *Hoag v. Place*, 93 Mich. 450; *Mudge v. Salisbury*, 110 N. Y. 413, 417; *Outhank v. L. S. & M. S. R. Co.*, 71 N. Y. 194.

designated person or for a specified term of years, this fact must be expressed in the deed.¹ The grant may be made in connection with the dominant tenement, or separately and as a distinct thing, thereby imposing the easement as a burden upon the estate of the grantor and rendering it servient to land already owned by the grantee.² Again it may be made by a covenant or condition, contained in the deed of the servient tenement, as to the method of using it in connection with another piece of land, though the latter does not belong to the grantor and though the deed is not signed by the grantee. So, in the process of partitioning land among co-tenants, such as tenants in common or joint tenants,³ or in the transfer by one transaction of a number of lots of land to different purchasers,⁴ easements may be expressly brought into existence by the agreements and stipulations inserted in the deeds. In short, all that is necessary to the creation of an easement by express grant is the evincing, in the deed, of a clear intention on the part of the grantor to make one parcel of land subservient to another, whether that other belongs at the time to himself or to a third person.⁵

§ 132. **Express Grant of Easements by Covenants or Conditions in Deeds.** — As was said above, covenants and conditions in deeds of corporeal property frequently impose easements upon the lands conveyed, or retain them on other real estate of the grantor. Prominent among these are those stipulations and agreements in grants, which restrict or regulate the use to be made of the property transferred or reserved.⁶ Thus, a very common form of covenant, put into deeds by which land

¹ *Lathrop v. Elsner*, 93 Mich. 599.

² *Holmes v. Seller*, 3 Lev. 305; *Gerard v. Cooke*, 5 B. & P. 109; Com. Dig., "Chemiu," D. 3.

³ *Huttenmeier v. Albro*, 18 N. Y. 48; *Ellis v. Bassett*, 128 Ind. 118; *Goodall v. Godfrey*, 53 Vt. 219; *Mason v. Horton*, 67 Vt. 266; *Kilgour v. Ashcom*, 5 H. & J. (Md.) 82; *Burwell v. Hobson*, 12 Gratt. (Va.) 322.

⁴ *Johnson v. Jordan*, 2 Met. (Mass.) 234, 242; *Russell v. Watts*, L. R. 25 Ch. Div. 559; *Swansborough v. Coventry*, 9 Bing. 305; *Mitchell v. Seipel*, 53 Md. 251; *Brakely v. Sharp*, 10 N. J. Eq. 206, 209; *Randall v. McLaughlin*, 10 Allen (Mass.), 366; *Warren v. Blake*,

54 Me. 276; *Stillwell v. Foster*, 80 Me. 333.

⁵ *Gibert v. Peteler*, 38 Barb. (N. Y.) 488, 514; see also *Trustees of Columbia College v. Lynch*, 70 N. Y. 440; *Story v. N. Y. El. R. Co.*, 90 N. Y. 122; *Barrow v. Richard*, 8 Paige (N. Y.), 351; *Richardson v. Tobey*, 121 Mass. 457; *Norfleet v. Cromwell*, 70 N. C. 634.

⁶ *Joy v. St. Louis*, 138 U. S. 1; *Van Rensselaer v. Albany & S. R. Co.*, 62 N. Y. 65; *Wetmore v. Bruce*, 118 N. Y. 319; *Coudert v. Sayre*, 46 N. J. Eq. 386; *Ladd v. Boston*, 151 Mass. 585; *Peck v. Conway*, 119 Mass. 546; *Stephens v. Hockemeyer*, 46 N. Y. St. Rep. 329, 19 N. Y. Supp. 666.

is conveyed, or reserved, or partitioned, is one which provides for the kinds of buildings which may be erected thereon, or regulates the character of the trades or business which the purchaser may carry on upon the premises.¹ When such agreements are incorporated into a number of deeds, by which the owner of a large tract of land splits it up into building lots and conveys them to a number of different purchasers, not only does the grantor thus obtain rights to compel the various lot owners to live up to these agreements, but those owners also ordinarily have reciprocal easements against one another, which will be recognized and enforced in a court of equity.² Another ordinary way of creating easements or servitudes by covenant is by laying out streets or ways across land, or open spaces such as squares or parks, and selling lots along them, or with reference to them, as places to be always kept open for the use of the purchasers. The vendor and his successors in interest thus become bound to keep such places open and unobstructed for the benefit of those who buy land in reliance upon the representations so made;³ and the various lot purchasers also acquire the right to restrain one another from closing or obstructing them.⁴

§ 133. **Maps or Plans, showing intended Grant of Easements.**

— When a map or plan, according to which lots are sold, designates a portion of the grantor's property as intended to be kept open for the benefit of the grantees, each purchaser acquires an easement to have that part kept open and unobstructed; and this, even though there is no express covenant to that effect inserted in his deed.⁵ The law raises such a covenant against the grantor from the fact that he sells with such a representation. But, according to the New York Court of Appeals, the only obligation that the law will thus imply from the exhibition of the plan or map and the selling of lots

¹ *Trustees of Columbia College v. Lynch*, 70 N. Y. 440; *Stetson v. Curtis*, 119 Mass. 266; *Coudert v. Sayre*, 46 N. J. Eq. 386; *Kilpatrick v. Peshine*, 24 N. J. Eq. 206; *Gawtry v. Leland*, 31 N. J. Eq. 385; *Middletown v. Newport Hospital*, 16 R. I. 319.

² *Trustees of Columbia College v. Thacher and Lynch*, 70 N. Y. 440, 87 N. Y. 311; *Equitable Life Assurance Soc. of U. S. v. Brennan*, 148 N. Y. 661; *Knight v. Simmons* (1896), W. N. 22; *Ayling v. Kramer*, 133 Mass. 12; *Tinker*

v. Forbes, 136 Ill. 221; *Herrick v. Marshall*, 66 Me. 435. See these equitable easements more fully discussed §§ 149-152, *infra*.

³ *Dexter v. Beard*, 130 N. Y. 549; *Coudert v. Sayre*, 46 N. J. Eq. 386; *Hogan v. Barry*, 143 Mass. 538.

⁴ *Tinker v. Forbes*, 136 Ill. 221; *Herrick v. Marshall*, 66 Me. 435; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Lowenberg v. Brown*, 79 N. Y. App. Div. 414.

⁵ *Ibid*.

with reference to it is the negative one, that prevents the closing of the open places indicated, or their use for any purpose inconsistent with the vendees' enjoyment of their easements in them; and, in the absence of express covenant that the vendor will use any portion of his land in a particular manner, he will not be required to erect anything upon it or do any affirmative act thereon for the benefit of the lot purchasers. In *Johnson v. Shelter Island Grove and Camp Meeting Association*,¹ lithographed maps, according to which lots from a large tract were sold at public auction, were distributed among the bidders. On the maps, a certain large space was indicated as open and public and called "The Ramble." In the middle of "The Ramble" was marked out a small, rectangular place, upon which was the word "Chapel." After the lots around "The Ramble" were sold and the deeds given, the association began to build a hotel upon the place marked "Chapel" on the map; and one of the purchasers, whose lot fronted on "The Ramble," brought an action to enjoin such erection and compel the building of a chapel upon the rectangular space. It was decided that, in the absence of covenant as to the character of the building to be constructed upon that space, the vendees were not entitled to the relief sought; and that the mere existence of the word "Chapel" upon that place on the map did not constitute any such covenant either express or implied. The court said, per Parker, J.: "It is the policy of the law to encourage the most advantageous use of land; and the courts will not be diligent in searching for pretexts with which to check the enterprise of an owner of the fee at the behest of one who is not actually interfered with in the proper enjoyment of his easement."² It is thought that this decision is to be regarded as, at best, a border-line case. Its doctrine is opposed by the New Jersey Court of Errors and Appeals in *Dill v. The School Board*;³ and it is safe to assume that, under such conditions, the New York courts would be quick to seize upon any slight additional facts or representations in order to raise a covenant implied, or created by estoppel, against the grantor.⁴

¹ 122 N. Y. 330.

² See *Downes v. D. & F. Co.*, 75 N. Y. App. Div. 513; *Matter of Mayor (Leggett Ave.)*, 80 N. Y. App. Div. 618, 620.

³ 47 N. J. Eq. 421.

⁴ See *Hay v. Knauth*, 36 N. Y. App. Div. 612.

§ 134. **Express Grant of Easements as Appurtenances to Land.** — When an easement has become appurtenant to a parcel of land, it usually passes with a conveyance of that land, whether mentioned in any covenant or condition or other part of the deed or not, and whether or not it is necessary to the enjoyment of the corporeal property by the grantee.¹ If, then, in transferring the land, it be desired to separate and reserve from it an easement which has once become appurtenant thereto, this must be done by the use of explicit and unmistakable terms. Where one owning a lot fronting on a public street bought other land in the rear adjoining that which he already possessed, which land so purchased had appurtenant to it a right of way over a private alley, he was not bound to relieve the alley from the easement existing on it and impose the burden upon the land already owned by him in the front.² When a way is appurtenant to land a part of which is conveyed to another, the right of way will exist in favor of each of the parts into which the original parcel is thus divided.³ But, although this is the broad form in which the law is usually stated, the principle must be taken with the modification that the burden on the servient tenement shall not be thereby made any greater than was originally intended. If, for example, the owner of a large field used for agricultural purposes should grant a small piece of it to another and reserve a right of way over the piece so granted, for the benefit of his remaining field, he could not then sell the field off into building lots and thus burden the way so reserved so that the owners of all the lots should be entitled to its enjoyment.⁴

Only incorporeal hereditaments can pass as appurtenant to land. "A thing corporeal can not properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing in-

¹ *Newman v. Nellis*, 97 N. Y. 285; *Webster v. Stevens*, 5 Duer (N. Y.), 682; *Huntington v. Asher*, 96 N. Y. 604; *Kent v. Waite*, 10 Pick. (Mass.) 138; *Underwood v. Carney*, 1 Cush. (Mass.) 285; *George v. Cox*, 114 Mass. 382; *Dority v. Dunning*, 78 Me. 381; *Pettingill v. Porter*, 8 Allen (Mass.), 1.

² *Zell v. First Universalist Society*, 119 Pa. St. 390. When a right of way is appurtenant to a piece of land which is passed to a lessee by an oral

demise, the way goes with the land. *Skull v. Glenister*, 16 C. B. n. s. 81, 90.

³ *Underwood v. Carney*, 1 Cush. (Mass.) 285, 290; *Watson v. Bioren*, 1 S. & R. (Pa.) 227; *Whitney v. Lee*, 1 Allen (Mass.), 198.

⁴ *Allan v. Gomme*, 11 Ad. & E. 759; *South Metr. Cemetery v. Eden*, 16 C. B. 42; *Henning v. Burnet*, 8 Exch. 187. See *Lewis v. Carstairs*, 6 Whart. (Pa.) 193.

corporeal.”¹ Whenever one piece of land passes in connection with the grant of another, it may be said to pass as “*parcel*,” but never by the use of the word “appurtenance;” and it is equally true that land can not pass as appurtenant to an incorporeal right, nor one incorporeal hereditament as appurtenant to another.²

b. *Easements created by Reservation in Deeds of Land.*

§ 135. **Reservation.** — In the deed by which land is conveyed, an easement may be created and reserved for the benefit of the grantor. This is illustrated by a case in which a grantor of land, bounded upon a stream of water, reserved to himself, by his deed, a privilege in the stream, for the benefit of his mill and the land under and around it which he retained.³ And where one, conveying a portion of his land, stated in the deed that he retained for himself a bridle path in front of his house and across the piece transferred, this was held to create an easement of a right of way by reservation.⁴

§ 136. **Reservation distinguished from Exception.** — A reservation of an easement or other servitude by deed always results in the creation of something new, — i. e. something which did not before exist as an easement or servitude, — and in retaining it as an item of property belonging to the grantor. Being thus brought into existence, as property, by the deed itself, it must always be incorporeal. Thus, if A sell the westerly half of his farm to B, and in the deed reserve to himself over that half a right to pass from a highway to the easterly half of the farm, which A retains for himself, the way is a new piece of property, made by A’s deed and owned by him as an easement created by reservation; for while, as owner of the entire farm, A had possessed the right to go over the westerly half as he pleased, yet he did not own that right *as an easement* until such westerly half became the

¹ Co. Lit. 121 b.

² Co. Lit. 121 b, 122 a; Harris v. Elliott, 10 Pet. (U. S.) 25, 54; Investment Co. v. O. & N. R. Co., 41 Fed. Rep. 378; Griffiths v. Morrison, 106 N. Y. 165; Jackson v. Hathaway, 15 Johns. (N. Y.) 447; Leonard v. White, 7 Mass. 6; Donnell v. Humphreys, 1 Mont. 518, 525.

³ Pettee v. Hawes, 13 Pick. (Mass.) 323; Phoenix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400.

⁴ Bean v. French, 140 Mass. 229; Mayo v. Newhoff, 47 N. J. Eq. 31; Tabbutt v. Grant, 94 Me. 371; Andrews v. Nat. Sugar Ref. Co., 72 N. Y. App. Div. 551.

property of B, because a man can not have an easement over his own land. On the other hand, an exception—or thing excepted—in a deed is something, whether corporeal or incorporeal, not created by the terms of the deed, but already in existence and expressly kept out from the operation of the grant and not allowed to pass under the deed. For example, if an owner of a farm convey it all, except the house thereon and the land under it and around it as a garden, or except a right of way, or right of flowage owned by him and appurtenant to the land transferred, such property retained is a proper *exception* and not a reservation.¹

It follows, as a matter of course, that easements may be created by reservations, but never by exceptions, since exceptions properly so called deal only with property rights already in existence. But the courts look at the substance and intention of a deed, rather than at its mere form; and so, frequently, the words employed are construed as creating an easement by reservation, although the property is spoken of as an exception, because it appears that the intention of the parties is to create something new and retain it for the grantor; while the word “reserving” or “reservation” is often held to refer only to a thing in existence, and not to be intended to raise incorporeal rights by reservation, because from an examination of the entire deed and the surrounding circumstances such appears to be its fair construction.² Accordingly, where the grantor of a tract of land stated in the deed that he *reserved* for himself “the wood and underground produce of the estate,” his statement was held to refer to an exception rather than to a reservation.³ And a deed which conveyed a city lot by metes and bounds, “*excepting* and *reserving* therefrom a strip of land ten feet wide . . . across the rear or inner end . . . for an alley,” was construed as passing to the grantee all the corporeal property mentioned, and reserving to the grantor an easement of an alleyway over the strip.⁴

¹ Boist v. Empie, 5 N. Y. 33; Myers v. Bell Telephone Co., 83 N. Y. App. Div. 623; Winthrop v. Fairbanks, 41 Me. 307; Smith v. Ladd, 41 Me. 314.

² Wood v. Boyd, 145 Mass. 176; White v. N. Y. & N. E. R. Co., 156 Mass. 181; Whitaker v. Brown, 46 Pa. St. 197; Haggerty v. Lee, 50 N. J. Eq.

464; Chicago, Rock Isl. & P. R. Co. v. D. & R. G. R. Co., 143 U. S. 596.

³ Doe d. Douglas v. Lock, 4 Nev. & M. 807, where the distinctions between exceptions and reservations are examined at length by Lord Chief Justice Denman.

⁴ Winston v. Johnson, 42 Minn. 398.

§ 137. **Requisites of Reservations of Easements.** — A reservation of an easement must always be to the grantor, and not to a stranger. If, for example, the grantor of an estate to A reserve a right of way over the land for B, a third person who is not a party to the deed, this gives nothing to B which he did not own before. If B already owned a way over the land, the effect of such a statement in the deed would be simply to save the grantor from any liability which might arise upon the covenants in his deed because of the existence of such easement.¹

Again, as a general rule, the reservation must be out of the estate granted, and not out of other property. But "in some peculiar cases such a reservation may operate in the nature of a grant from the grantee, to charge upon other premises the burden of contributing the means of enjoying what is thus reserved."² When, however, the grantee makes such a charge upon another estate, — and that other estate must evidently be other property of his own, — he is simply, in the one deed between him and the grantor, conveying something to the grantor, not strictly by way of *reservation*, since it is not *reserved* out of that with which the grantor parts, but as a separate and distinct covenant or contract incorporated into the deed by which the grantor conveys to him the land.³

Lastly, a reservation being equivalent to a grant, and in fact a form of grant, the strict rule of law requires that there shall be proper words of limitation and inheritance — the use of the word "heirs" in some collocation — if the grantor intend the right to extend beyond his own life.⁴ This is simply an application of the common-law principle, which, with a few exceptions, requires the use of the word "heirs" in order to the creation or conveyance of an estate in fee

¹ Hill v. Lord, 48 Me. 83, 95; Bridger v. Pierson, 45 N. Y. 601, 603; West Point Iron Co. v. Reymert, 45 N. Y. 703.

² 3 Wash. R. P. p. *646.

³ Holms v. Seller, 3 Lev. 305; Gilbert v. Peteler, 38 Barb. (N. Y.) 488, 514; Dyer v. Sandford, 9 Met. (Mass.) 395; Randall v. Latham, 36 Conn. 48, 53; Emerson v. Mooney, 50 N. H. 315; Haggarty v. Lee, 54 N. J. L. 580.

⁴ Durham & S. R. Co. v. Walker, 2

Q. B. N. S. 940, 967; Claffin v. B. & A. R. Co. 157 Mass. 489; Ashcroft v. Eastern R. Co., 126 Mass. 196; Bean v. French, 140 Mass. 229; Jamaica Pond Aqueduct Co. v. Chandler, 9 Allen (Mass.), 159; Curtis v. Gardner, 13 Met. (Mass.) 457; Hornbeck v. Westbrook, 9 Johns. (N. Y.) 73. See Baker v. Mott, 78 Hun (N. Y.), 141; Railroad Co. v. Malott, 135 Ind. 113; Walz v. Walz, 101 Mich. 167.

simple by deed. But, with regard to easements and servitudes created by reservation, the modern cases on both sides of the Atlantic have relaxed this strict, technical rule, and now seek to determine the extent of the right by getting at the intention of the parties to the instrument. In doing this, a clear distinction is drawn between the reservation of a common-law easement and that of the form of servitude which is called an easement in gross. The latter, being personal in its nature and not connected with any lands belonging to its owner, is conclusively presumed to have been intended to last for his life only, unless it is reserved to him and his heirs. But when the right retained is a common-law easement, and therefore appurtenant to land of the grantor, the presumption, in the absence of words or circumstances to show the contrary, is that it is meant to be a permanent accession and benefit to that land.¹ As is explained above,² the question whether the privilege reserved is an easement in gross, — a mere personal right, — or is to be construed as appurtenant to some other estate, “must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.”³

c. Easements created by Implied Grant or Reservation.

§ 138. **Implied Grant or Reservation — Illustrations — Forms.** — The subject of easements arising by implication of law presents a broad field of inquiry. Whenever such rights are called into existence, in favor of either grantor or grantee, in the absence of words which can be construed as directly creating them, but for the purpose of enabling the owner of land properly to use and enjoy that which has been conveyed to him, or retained by him when he conveyed other land, they are easements created by implied grant;⁴ and in many in-

¹ Coudert v. Sayre, 46 N. J. Eq. 386, 395; Hagerty v. Lee, 54 N. J. L. 580; Cooper v. Louanstein, 37 N. J. Eq. 284; Newhoff v. Mayo, 48 N. J. Eq. 619; Bowen v. Conner, 6 Cush. (Mass.) 132; Mendell v. Delano, 7 Met. (Mass.) 176; Winthrop v. Fairbanks, 41 Me. 307; Karmuller v. Krotz, 18 Iowa, 352; Whitney v. Union R. Co., 11 Gray

(Mass.), 359, 365; Kuecken v. Voltz, 110 Ill. 264.

² § 128, *supra*.

³ Peck v. Conway, 119 Mass. 546, 549.

⁴ New Ipswich Factory v. Bachelder, 3 N. H. 190; Outerbridge v. Phelps, 13 Abb. N. C. (N. Y.) 117, 125; Taylor v. Boulware, 35 La. An. 469; Jones, Ease. § 141.

stances such rights and duties are brought into existence and enforced so as to work out justice between parties between whom the relation of grantor and grantee does not exist, or as to whom there is no privity,¹ nor any other contractual relation. When, for example, a person has erected a mill, and for its use cut an artificial raceway through his own land, and then sells the mill, retaining the land through which the raceway passes, the right to use such waterway in connection with the mill granted continues annexed by implication to the mill as necessary to its beneficial use and enjoyment. Again, if the owner of a tract of land sell a portion of it entirely surrounded by that which he keeps, or a portion which entirely surrounds the part retained by himself, a way of necessity is at once implied in favor of the piece of land which is so enclosed. And purchasers of neighboring city lots, all from the same source of title, who take their deeds with uniform restrictive covenants therein restraining them from using their land in ways in which they might otherwise employ it, ordinarily have in a court of equity, raised by implication for the purpose of working out justice among them, the right to enjoin and prevent one another from breaking or violating such restrictive covenants. Numerous as are the cases such as these which the reports present, they may be grouped into three general classes, which are typified by the three illustrations just given. These three modes of creating easements by implied grant or reservation are: (a) *By severance of an entire piece of property and conveyance of a part thereof*, of which method the first of the above illustrations is an instance; (b) *By creating ways of necessity*, of which the second illustration is an example; and (c) *By raising equitable easements*, or servitudes, which are typified by the last of the above illustrations. By each of these modes of implied grant or reservation are brought into existence many varieties of easements, which are next to be examined in the order here indicated.

§ 139. (a) **Easements arising by Implication from the Severance of an Entire Piece of Property and Conveyance of a Part thereof.** — Accurately speaking, a person can not have an easement over his own land. If he burden a portion or tract of

¹ Privity is "mutual or successive relationship to the same rights of property." 1 Greenl. Ev. §§ 189, 523. There is such relationship between grantor and

grantee, ancestor and heir, or owners in common of land; but not, of course, between mere neighbors.

it in favor of another tract or portion, as by draining one piece over the other, or by building a house upon one part in such a manner that it is supported by the other part, he creates what *would be* an easement if the owner of one parcel of land had a right to enjoy it over the land of another; but it is at most only what some writers call a *quasi* easement so long as both tenements belong to the same proprietor.¹ If, with things in this condition, the two parts come into the hands of different persons, either by the owner's selling or otherwise transferring the piece which enjoys the right and retaining that upon which the burden rests, or by his conveying the servient parcel and keeping the dominant, an easement may be brought into existence, and such will usually be the result. One leading principle, upon which rests the creation of easements in this manner, is that the parties to the transfer are presumed to act with reference to the actual, visible, and known condition of the properties at the time, and to intend that the benefits and burdens manifestly belonging to each part of the entire tract shall remain unchanged.² And the other principle, which has caused a wide distinction to be made in this connection between implied *grants* and implied *reservations* of easements, is that a grant is to be construed most strongly against the grantor and in favor of the grantee.³ It is this last principle that compels us to consider the class of easement now before us under two subheads; namely, those created by implied *grant* and those created by implied *reservation*.

§ 140. **Easements created by Implied GRANT, upon Severance of Entire Tract of Land.** — The law is uniform, in England and throughout the United States, that, upon a severance of

¹ Such an adaptation of his property or properties by the same owner, so that one part shall enjoy a right or privilege to the detriment or burdening of another, corresponds to what in the French law is called *destination du père de famille*. Pardessus, *Traité des Servitudes*, 430, 431; Code Nap. art. 642; La. Civ. Code, art. 763; Seymour v. Lewis, 13 N. J. Eq. 439, 443. See Gale & What. Ease. 50-52; Goodall v. Godfrey, 53 Vt. 219.

² Lampman v. Milks, 21 N. Y. 505; Paine v. Chandler, 134 N. Y. 385; Curtiss v. Ayrault, 47 N. Y. 73; Simmons

v. Cloonan, 81 N. Y. 557; O'Rourke v. Smith, 11 R. I. 259; Brazier v. Glasspool (1901), W. N. Cas. 237.

When the incidents or *quasi* easements are open and visible, knowledge of their existence is inferred as to both grantor and grantee. Simmons v. Cloonan, 81 N. Y. 557; United States v. Appleton, 1 Sumn. (U. S.) 492.

³ Russell v. Watts, L. R. 25 Ch. Div. 559, 572; Wells v. Garbutt, 132 N. Y. 430; Sullivan v. Ryan, 130 Mass. 116; Toothe v. Bryce, 50 N. J. Eq. 589; Warren v. Blake, 54 Me. 276, 289; Burns v. Gallagher, 62 Md. 462.

an entire tract of land by its owner and the transfer of the *dominant* portion, an easement arises in favor of the grantee in all those apparent and reasonably necessary appendages with which the land retained by the grantor has been encumbered in favor of that conveyed.¹ Or, as stated by the New York Court of Appeals, per O'Brien, J., "When the owner of a tract of land conveys a distinct part of it to another, he impliedly grants all those apparent and visible easements which at the time of the grant were in use by the owner for the benefit of the part so granted, and which are essential to a reasonable use and enjoyment of the estate conveyed. The rule is not limited to continuous easements or to cases where the use is absolutely necessary to the enjoyment of the thing granted. It applies to those artificial arrangements which openly exist at the time of the sale, and materially affect the value of the thing granted."² Nor is it necessary that that which is thus claimed as an easement shall be in actual use at the time when the grant is made. It is sufficient that it is open, visible, and reasonably necessary, and that the grantor has knowledge of its existence. The grantee is then presumed to contract with reference to it and to intend to acquire it as a part of his purchase. In the case of *Spencer v. Kilmer*,³ from which the above-quoted language of the New York Court of Appeals is taken, the lessor of a parcel of land, upon which, pursuant to the requirements of the lease, the lessee had built fish ponds and then had laid conduits from the ponds to springs on adjoining land of the lessor not embraced in the lease, sold the property upon which the fish ponds were thus constructed for him "with the appurtenances," and retained title to the property where were the springs. At the time of the sale, some of the conduits were not in actual use; but all of them were there visible and ready to be used at any time, and the springs on the land of the grantor were the only reasonably available source of supply of water for the fish ponds. It was held that the right to

¹ *Wheeldon v. Burrows*, L. R. 12 Ch. Div. 31; *Brazier v. Glasspool* (1901), W. N. Cas. 237; *Lampman v. Milks*, 21 N. Y. 505; *Spencer v. Kilmer*, 151 N. Y. 390. Also *Katz v. Kaiser*, 154 N. Y. 294, 298; *Wilson v. Wightman*, 36 N. Y. App. Div. 41; *Tooth v. Bryce*, 50 N. J. Eq. 589; *Johnson v. Jordan*, 2 Met. (Mass.) 234; *Case v.*

Minot, 158 Mass. 577; *Janes v. Jenkins*, 34 Md. 1; *Ingals v. Plamondon*, 75 Ill. 118.

² *Spencer v. Kilmer*, 151 N. Y. 390, 398. Also *Snow v. Pulitzer*, 142 N. Y. 263; *Whalen v. Manchester Land Co.*, 65 N. J. L. 206.

³ 151 N. Y. 390.

conduct the water from the springs to the ponds, through the pipes thus laid, passed with the deed to the grantee. The ponds having been built for the grantor and with his knowledge, he was bound by the same rule as if he had placed them there himself. O'Brien, J., said further: "The thing which the defendant [the grantor] granted was the lot with the fish pond then in use, constituting a very important element in the value of the property. The principal appliances for maintaining it by supplying the water were open and visible, and the defendant knew that there was no reasonable way to maintain it without them." So, where the owner of two lots of land built on one of them a house, the cornice of which projected over the other lot, and then sold the house and the land on which it stood, it was held that neither he nor those who succeeded to his title to the vacant lot could prevent the grantee of the house from maintaining the cornice as thus constructed.¹ Such easements are not implied, however, when co-owners of land partition it by conveying at the same time separate pieces to each other,² nor when one owner of land divides it into separate parcels which he sells to different purchasers by one and the same transaction, unless it appear from the circumstances that such rights already in existence were *intended* to continue as easements.³ In these cases the courts more readily presume that each owner was intended to take his parcel in severalty, free and clear of any rights in the others; and, therefore, if easements are to arise from such a severance of an entire estate, they must be expressly granted or reserved, or their continuance must be a strict necessity, or the intent to bring them into existence must be otherwise clearly manifested.⁴

¹ Grace M. E. Church v. Dobbins, 153 Pa. St. 294. See Nichols v. Chamberlain, Cro. Jac. 121.

² Whyte v. Builders' League, 164 N. Y. 429.

³ Russell v. Watts, L. R. 25 Ch. Div. 559; Johnson v. Jordan, 2 Met. (Mass.) 234; Warren v. Blake, 54 Me. 276; Huttemeier v. Albro, 18 N. Y. 48, 51; Ellis v. Bassett, 128 Ind. 118; Goodall v. Godfrey, 53 Vt. 219; Mason v. Horton, 67 Vt. 266; Burwell v. Hobson, 12 Gratt. (Va.) 322.

⁴ Referring to an easement created by the simultaneous sales of several lots by the same grantor, Lord Justice

Cotton said: "It really is not a reservation, but in order to make all those grants which are looked upon as one transaction available and effectual, it is considered that each of the grantees is to be looked upon as taking from the grantor, while he has still the power to give it, what it is right that he should get; so that there is an implicit grant against all the other grantees of those easements which will be reasonably necessary for the property which is conveyed." Russell v. Watts, L. R. 25 Ch. Div. 559, 573. Also Blakely v. Sharp, 10 N. J. Eq. 206; Mitchell v. Seipel, 53 Md. 251.

In order that an easement may arise by implied grant, it must be of value to the estate conveyed, and the grantee must be presumed to have taken it into consideration and paid for it in connection with his purchase.¹ It must also be "*reasonably*"² (though not absolutely) "necessary" to the use and enjoyment of that which is expressly granted. By this is said to be meant that, "if without alteration involving labor and expense, the convenience is fit and proper for the use of the property as it exists at the time of the conveyance, or so *necessary* in that sense, the easement passes."³ "The law gives a reasonable intendment in all such cases to the grant, and passes with the property all those easements and privileges which at the time belong to it and are in use as appurtenances."⁴ It must, moreover, be open and *apparent*, i. e. there must be some visible sign or mark, by which a person who was examining the entire property with reasonable care could discover that one portion of it was burdened in favor of another.⁵ Such are party-wall rights,⁶ an open ditch or canal,⁷ visible pipes used for conduits or aqueducts,⁸ and the like.⁹

¹ Paine v. Chandler, 134 N. Y. 385; Curtiss v. Ayrault, 47 N. Y. 73; Simmons v. Cloonan, 81 N. Y. 557, 566; O'Rourke v. Smith, 11 R. I. 259; Henry v. Koch, 80 N. Y. 391. "On the other hand, the presumption that the parties contract with reference to the visible condition of the property at the time may be repelled by actual knowledge on the part of the contracting parties of facts, which negative any deduction to be drawn from the apparent condition." Jones, *Ease*, § 126; Simmons v. Cloonan, 81 N. Y. 557; United States v. Appleton, 1 Sumn. (U. S.) 492.

² Not *absolutely* necessary, but reasonably requisite. McElroy v. McLeary, 71 Vt. 396.

³ Howell v. Estes, 71 Tex. 690, 694; Preble v. Reed, 17 Me. 169; Sloat v. McDougall, 30 N. Y. St. Rep. 912; Snow v. Pulitzer, 142 N. Y. 263; Spencer v. Kilmer, 151 N. Y. 390.

⁴ United States v. Appleton, 1 Sumn. (U. S.) 492, 500.

⁵ Suffield v. Brown, 4 De G. J. & S. 185; United States v. Appleton, 1 Sumn. (U. S.) 492; Butterworth v.

Crawford, 46 N. Y. 349; Phillips v. Phillips, 48 Pa. St. 178; Ingalls v. Plamondon, 75 Ill. 118; Providence Tool Co. v. Corliss Steam Engine Co., 9 R. I. 564; Sanderlin v. Baxter, 76 Va. 299.

⁶ Rogers v. Sinsheimer, 50 N. Y. 646; Griffiths v. Morrison, 106 N. Y. 165; Western Nat. Bank's Appeal, 102 Pa. St. 171.

⁷ Dodd v. Burchell, 1 Hurl. & C. 113; Hair v. Downing, 96 N. C. 172; Munson v. Reid, 46 Hun (N. Y.), 399.

⁸ Nicholas v. Chamberlain, Cro. Jac. 121; Wardle v. Brocklehurst, 1 El. & El. 1058; Butterworth v. Crawford, 46 N. Y. 349; Dolliff v. Boston & M. R. Co., 68 Me. 173.

⁹ The fact that a pipe, aqueduct, etc., is concealed from casual vision does not prevent it from being apparent within the requirement of this rule. If by ordinary inspection it would be discovered through marks, objects, or indications of any kind, this is sufficient to make it apparent. Nicholas v. Chamberlain, Cro. Jac. 121; Pyer v. Carter, 1 H. & N. 916; Watts v. Kelson, L. R. 6 Ch. App. 166; Toothe v. Bryce, 50 N. J.

It was formerly declared, also, that no such right or privilege could pass by implication, unless, when acquired as an easement, it would be *continuous* in its nature, i. e. would be enjoyed without the necessity of any act of man. This requirement is prominently dwelt on in the leading case of *Lampman v. Milks*,¹ and is mentioned as a prerequisite in many of the text-books and decided cases.² But most of the authorities which dwell on this requirement employ the word "continuous" in the sense of *permanent*, and not with its technical signification, to denote a continuous easement as above defined;³ and all that is actually required in this respect is that, from the visible and apparent disposition and arrangement of the parts of his property before the severance, it must appear that it was the purpose of the owner to create a permanent and common use and enjoyment of the one part for the benefit of the other.⁴ In the above quotation from the opinion of the New York Court of Appeals in *Spencer v. Kilmer*⁵ we find these words: "The rule is not limited to *continuous* easements or to cases where the use is absolutely necessary to the enjoyment of the thing granted. It applies to those artificial arrangements which *openly* exist at the time of the sale, and materially affect the value of the thing granted." While this utterance is only a *dictum*, the easement involved in that case being continuous in the strict, technical sense, yet it seems to be most fully in harmony with the reasons which give rise to easements by implied grant, and to have the support of the most carefully considered decisions with regard to such easements as are discontinuous but at the same time open and visible and apparently meant to be permanent.⁶

Eq. 589. And an easement or servitude is apparent if the parties have actual knowledge of its existence, or knowledge of facts which should put them as reasonable persons upon inquiry. *Larsen v. Peterson*, 53 N. J. Eq. 88. And see *Tabor v. Bradley*, 18 N. Y. 109.

¹ 21 N. Y. 505; *Jones, Ease.* §§ 143-147.

² See *Watts v. Kelson*, L. R. 6 Ch. App. 166; *Sullivan v. Ryan*, 130 Mass. 116; *Bolton v. Bolton*, L. R. 11 Ch. Div. 968; *Parsons v. Johnson*, 68 N. Y. 62, 66. The Supreme Court of Rhode Island says: "The rule applies espe-

cially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and water-pipes or spouts, all these being *continuous* easements technically so called, — that is to say, easements which are enjoyed without any active intervention of the party entitled to enjoy them." *O'Rourke v. Smith*, 11 R. I. 259, 263.

³ § 129, *supra*.

⁴ *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582; *Francie's Appeal*, 96 Pa. St. 200; *Flint v. Bacon*, 13 Hun (N. Y.), 454.

⁵ 151 N. Y. 380, 391.

⁶ Cases cited above in connection

§ 141. **Easements created by Implied RESERVATION upon Severance of Entire Tract of Land.** — There are some weighty opinions and decisions, especially among the earlier cases, to the effect that an easement will as readily arise by implied reservation as by implied grant,—that if the owner of an entire tract of land, one piece of which enjoys a right or *quasi* easement over the other, convey the servient part and retain the dominant, an easement will be implied in his favor as freely and fully as it would have been implied against him if he had sold the portion which enjoyed the privilege and retained that which sustained the burden. The leading decision in support of this doctrine is the much-discussed and criticised case of *Pyer v. Carter*,¹ decided in 1857. In that case, the owner of two houses constructed a visible drain under both of them; and then sold, first the lower house, under which the other was drained, to one purchaser, and then the higher house to another purchaser. The vendee of the lower house stopped the drain. In an action against him by the second vendee, judgment was rendered in favor of the latter, although it was not shown that the vendee of the lower house had any actual knowledge of the drain at the time of his purchase. The court said that the defendant took his piece of the property subject to all the existing, apparent signs of servitude, and that by “apparent signs was to be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject.”² The purchaser of the upper house bought it with the right to the drain existing as an easement appurtenant. The principle thus enunciated has been adhered to in some of the United States, such as New Hampshire, Vermont, Pennsylvania, Illinois, North and South Carolina, and perhaps some others;³ and it was followed by the earlier decisions in New York and New Jersey.⁴

with this section; *Brazier v. Glasspool* (1901), W. N. Cas. 237; *Barkshire v. Grubb*, L. R. 18 Ch. Div. 616; *Thomson v. Waterlow*, 6 Eq. 36; *Bolton v. Bolton*, L. R. 11 Ch. Div. 958; *Parsons v. Johnson*, 68 N. Y. 62, 66; *Jones, Ease*, § 195.

¹ 1 H. & N. 916.

² 1 H. & N. 916, 922.

³ *Dunkles v. Wilton R. Co.*, 24 N. H. 489; *Harwood v. Benton*, 32 Vt. 724; *Ormsby v. Pinkerton*, 159 Pa. St. 458;

Geible v. Smith, 146 Pa. St. 276; *Cihak v. Klekr*, 117 Ill. 643; *Hair v. Downing*, 96 N. C. 172; *Crosland v. Rogers*, 32 S. C. 130; *Steinke v. Bentley*, 6 Ind. App. 663.

⁴ *Lampman v. Milks*, 21 N. Y. 505; *Outerbridge v. Phelps*, 13 Abb. N. C. (N. Y.) 117; *Kelly v. Dunning*, 43 N. J. Eq. 62; *Fetters v. Humphreys*, 18 N. J. Eq. 260. See La. Rev. Civ. Code, art. 769.

But the case of *Pyer v. Carter* has been so thoroughly disapproved in England that it is practically overruled;¹ and in this country the decisions of many of the best courts deny that an easement can be as readily reserved for the grantor as implied in favor of the grantee.² This is upon the principle that a deed is to be most strictly construed against the grantor, and, further, that a grantor shall not be permitted to derogate from his own grant. The purchaser may have the benefit of all fair implications and intendments; and so the severance of an entire tract may impliedly confer upon him an easement, if it be *reasonably necessary* to the enjoyment of his property. But, say these later cases, the general rule is that the vendor can not have the benefit of any such presumptions, to the impairment of that which he has expressly granted; and, when he is to have an easement over land that he has absolutely conveyed, he must be able to establish it by express contract or reservation. Such is now the settled law of New York,³

¹ *Suffield v. Brown*, 4 De G. J. & S. 185, 196 (1864); *Brown v. Alabaster*, L. R. 37 Ch. Div. 490; *Russell v. Watts*, L. R. 25 Ch. Div. 559; *Ford v. Met. R. Co.*, L. R. 17 Q. B. Div. 12, 27; *Pollard v. Gare* (1901), 1 Ch. 834.

² *Wells v. Garbutt*, 132 N. Y. 430; *Sloat v. McDougall*, 30 N. Y. St. Rep. 912, 9 N. Y. Supp. 631; *Sullivan v. Ryan*, 130 Mass. 116; *Carbrey v. Willis*, 7 Allen (Mass.), 364; *Warren v. Blake*, 54 Me. 276; *Stevens v. Orr*, 69 Me. 323; *Tooth v. Bryce*, 50 N. J. Eq. 589; *Larsen v. Peterson*, 53 N. J. Eq. 88; *Burns v. Gallagher*, 62 Md. 462; *Mitchel v. Seipel*, 53 Md. 251; *Scott v. Bentel*, 23 Gratt. (Va.) 1, 7; *Walker v. Clifford*, 29 So. Rep. 588 (Ala.).

³ *Wells v. Garbutt*, 132 N. Y. 430; *Paine v. Chandler*, 134 N. Y. 385; *Sloat v. McDougall*, 30 N. Y. St. Rep. 912. In *Wells v. Garbutt*, Vann, J., said, at p. 435: "As a grantor cannot derogate from his own grant, while a grantee may take the language of the deed most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor, and this distinction explains many of the apparent inconsistencies in the reported cases. Some learned judges, in considering what may be

termed an implied grant, as distinguished from an implied reservation, without, however, mentioning the distinction, have used language apparently applicable to all easements existing by implication, when, in fact, intended to be limited to those existing in favor of a grantee. Others, in deciding that an easement was impliedly created by a grant and conveyed to the grantee, have gone farther in their discussion than the point involved required and have broadly declared the rule to be reciprocal and applicable alike to benefits conferred and burdens imposed, provided the marks of either were open and visible. Such was the case of *Lampman v. Milks*, 21 N. Y. 505, where the discussion outran the decision, for, while it was decided that, on the facts then appearing, an easement should be implied in favor of the grantee, against the grantor and his remaining lands, it was asserted that under like circumstances an easement would be implied in favor of the grantor, against the grantee and his lands. The latter proposition was involved neither in the case decided, nor in any of those called upon to support it, except such as have since been overruled, either expressly or impliedly."

New Jersey, Massachusetts, Maine, Maryland, Virginia, and Mississippi.¹

While such is the general rule as to creation of easements by implied reservation, there are some important exceptions to it, which are recognized by all courts and which are next to be examined.

§ 142. **Classes of Easements which may be created by Implied Reservation.** — The general principle is that a grantor can not derogate from his own grant. Yet, even in those jurisdictions where this maxim is most rigidly enforced, there are two well-recognized classes of cases in which the grantor must be accorded an easement over the property conveyed, although his deed is silent upon the matter. One of these is where there are mutual easements or servitudes required by both parties to the contract; as where the owner of two houses which mutually support each other, or both of which rest upon a wall, — as a party wall, — sells one and retains title to the other. Here, just as an easement in the right to support passes by implication to the grantee, so, as a matter of logical necessity, a similar easement is impliedly reserved to the grantor.² The other class embraces those rights and privileges which are *absolutely or for all practical purposes necessary* to the enjoyment by the grantor of the property retained by him, as where a man continues to own a lot of land entirely surrounded by other land which he sells. He then has a right of way of necessity, although the deed by which he transfers the surrounding property make no mention of any such right.³

§ 143. (b) **Ways of Necessity — How they arise.** — The creation of easements by implied grant or reservation as thus far discussed, where an entire tract or estate is divided and a portion of it conveyed, ordinarily results from the fact that, before such division, one part of the property was encumbered in favor of the other with a distinct and well-defined ease, burden, or servitude, and the separation of the two pieces caused this to become a complete easement. Thus, if one who has established a drain from his house over his adjacent lot sell the former and retain the latter, the right to the

¹ Last note but one; also *Crosland v. Rogers*, 32 S. C. 130, 133; *Bonelli v. Blakemore*, 66 Miss. 136.

² *Richards v. Rose*, 9 Exch. 218; *Snow v. Pulitzer*, 142 N. Y. 263.

³ The right of way of necessity, which is the illustration of this class, is more fully explained in the following sections.

drain as *then existing* and reasonably necessary becomes an easement belonging to the purchaser. A way of necessity differs from cases such as this, in that, while it always springs from an implied grant or reservation resulting from some division of land into at least two distinct pieces, it does not require that any defined and known way as such shall have previously existed over the one parcel and in favor of the other. The fact alone that the purchaser of a thing can not use it for any beneficial purpose, without the enjoyment of some right or privilege in connection with other property of the vendor, causes the law to presume that the parties intended that right or privilege to pass with the grant, though it did not before distinctively exist; and in like manner the fact alone that the vendor can not use for any beneficial purpose that which remains to him, unless he enjoy some right or privilege over what he has conveyed, causes the law to presume a reservation of such right or privilege.¹ Hence, when a conveyance is made of a lot of land entirely surrounded by other land of the vendor, or surrounded partly by his land and partly by that of other persons through which no available way exists for the grantee; or when, under like conditions, the grantor retains the lot so enclosed and conveys the other portion of his property, a way of necessity is thereby brought into existence for the benefit of the owner of the parcel thus surrounded.² The circumstances may be such as to cause this way to be located over a road already in existence; but if there be no such road or none that is suitable, the owner of the servient tenement has the right to designate where one shall exist, provided he makes it reasonably convenient for the enjoyment of the dominant property.³ In accordance with the general principle, however, that no implication runs against the state, a legislative grant or other conveyance by the state has been held not to pass with it a way of necessity.⁴

¹ Warren v. Blake, 54 Me. 276.

² Pomfret v. Ricroft, 1 Saund. pp. *320, *323, No. 6; Clark v. Cogge, Cro. Jac. 170; Howton v. Frearson, 8 T. R. 50; Gayford v. Moffatt, L. R. 4 Ch. App. 133; Palmer v. Palmer, 150 N. Y. 139; Bass v. Edwards, 126 Mass. 445; Seymour v. Lewis, 13 N. J. L. 439, 444; Ogden v. Grove, 38 Pa. St. 487; Collins v. Prentice, 15 Conn. 39; Woodworth v. Raymond, 51 Conn. 70, 75; Dee v.

King, 73 Vt. 375; Stewart v. Hartman, 46 Ind. 331.

³ Pearson v. Spencer, 1 B. & S. 571; Palmer v. Palmer, 150 N. Y. 139; Schmidt v. Quinn, 136 Mass. 575; Bolton v. Bolton, L. R. 11 Ch. Div. 968; Kripp v. Curtis, 71 Cal. 62; Cheney v. O'Brien, 69 Cal. 199; Capers v. Wilson, 3 McCord (S. C.), 170.

⁴ Pearne v. Cold Creek M. & M. Co., 90 Tenn. 619.

It is not the necessity alone, but the implied grant or reservation that gives rise to a way of this kind. "Such a way is not created by mere necessity, but always originates in some grant or change of ownership, to which it is attached, by construction as a necessary incident, presumed to have been intended by the parties."¹ Therefore it can not arise over the property of one who is a stranger to the transaction by which land is conveyed and acquired.² To bring it into existence one of the parcels or tracts involved must be conveyed, or its ownership must be changed by operation of law. Such direct transfer, by act of the parties, may be made by deed, or devise, or by a partition among co-owners;³ and a sale of land on execution, or pursuant to the judgment of a competent court, is an illustration of its passing by operation of law.⁴ When a way has sprung up through any such transaction, it endures, as the property of the owner of the dominant estate and the successors to his title, as long as the necessity continues.⁵

§ 144. **Founded on Necessity.** — There must be a *necessity* for its use in connection with the enclosed parcel of land, in order that such a way may come into existence. The fact that it is very convenient, or more convenient than some other means of access, will not suffice.⁶ Thus, where the

¹ *Woodworth v. Raymond*, 51 Conn. 70, 75; *Stewart v. Hartman*, 46 Ind. 331; *Tracy v. Atherton*, 35 Vt. 52.

² *Bullard v. Harrison*, 4 M. & S. 387; *Proctor v. Hodgson*, 10 Exch. 824; *Woodworth v. Raymond*, 51 Conn. 70. "If a man can be supposed to hold land without any right of access to it, a grant of it would not convey to the grantee any right to pass over the adjoining land, however necessary it might be to the enjoyment of the thing granted. He would acquire nothing more than the grantor held." *Nichols v. Luce*, 24 Pick. (Mass.) 102, 104.

³ *Palmer v. Palmer*, 150 N. Y. 139; *Viall v. Carpenter*, 14 Gray (Mass.), 126; *Murphy v. Lincoln*, 63 Vt. 278; *Ellis v. Bassett*, 128 Ind. 118; *Blum v. Weston*, 102 Cal. 362.

⁴ *Pernam v. Wead*, 2 Mass. 203; *Schmidt v. Quinn*, 136 Mass. 575; *Smith v. Tarbox*, 31 Conn. 585; *White v. Story*, 2 Hill (N. Y.), 543, 549; *Val-*

ley Falls Co. v. Dolan, 9 R. I. 489. But where land was taken by condemnation proceedings for a school, and no attempt was made to condemn any way to it, although it was land-locked, no way of necessity existed—none could be implied under such conditions. *Banks v. School Directors*, 194 Ill. 274.

⁵ *Logan v. Stogsdale*, 123 Ind. 372; *Taylor v. Warnaky*, 55 Cal. 350.

⁶ *Proctor v. Hodgson*, 10 Exch. 824; *Holmes v. Goring*, 2 Bing. 76; *London v. Riggs*, L. R. 13 Ch. Div. 798; *Union L. Co. v. London G. D. Co.* (1902), 2 Ch. 557; *Palmer v. Palmer*, 150 N. Y. 139; *Ogden v. Jennings*, 62 N. Y. 526; *Bascom v. Cannon*, 158 Pa. St. 225; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; *Quimby v. Straw*, 71 N. H. 160; *Dee v. King*, 73 Vt. 375. There are some early *dicta* to the effect that the way will arise if it be *reasonably* convenient though not strictly necessary. In one case, Lord Mansfield said: "I know

purchased property is surrounded on three sides by land of the vendor and on the other one by the ocean or other navigable body of water, while the approach by land might be much the easier and shorter, yet, since the vendee *can* reach his lot by using a boat, he has no right by implication to pass over his grantor's adjacent premises.¹ So, if the grantee can reach his property over a public highway, though it be long and round about,² or if he have a steep, narrow, and inconvenient road across land of a third party,³ no way of necessity arises in his favor. And the fact that it is much cheaper to float logs from the lot granted, down a non-navigable stream which flows over land of the grantor, does not give a way of necessity down that stream, when there is another way out by railroad.⁴

The older books and cases use language to the effect that the necessity must be absolute, — i. e. that there must be no other means whatever of getting to the land, — in order that a way of necessity shall be brought into existence. But the better statement of the rule, which is sustained by the latest and best decisions, seems to be that such a way will arise when, without it, there could be no practical use of the enclosed property, or it could not be used in the manner or for the purpose manifestly intended by the parties to the conveyance.⁵ If, for example, the consideration for the enclosed parcel were five thousand dollars, and it would cost five hundred thousand dollars to construct any approach to it, other than one over the vendor's adjacent land, a way of necessity would be implied.⁶

not how it has been expounded, but it would not be a great stretch to call that a necessary way without which the most convenient and reasonable mode of enjoying the premises could not be had." *Morris v. Edgington*, 3 Taunt. 24, 31. See also *Pheysey v. Vicary*, 16 M. & W. 484; *Lawton v. Rivers*, 2 McCord (S. C.), 445; *Alley v. Carleton*, 29 Tex. 74; *Watts v. Kelson*, L. R. 6 Ch. App. 166, 175.

¹ *Kingsley v. Goldsborough Land Imp. Co.*, 86 Me. 279; *Turnbull v. Rivers*, 3 McCord (S. C.), 131; *Lawton v. Rivers*, 2 McCord (S. C.), 445; *Burlew v. Hunter*, 41 N. Y. App. Div. 148, 151. But see *Jay v. Michael*, 92 Md. 198.

² *Vossen v. Dantel*, 116 Mo. 379;

Gayetty v. Bethune, 14 Mass. 49; *Stuyvesant v. Woodruff*, 21 N. J. L. 133.

³ *Dodd v. Burchell*, 1 Hurl. & C. 113; *Carey v. Rae*, 58 Cal. 159; *Kripp v. Curtis*, 71 Cal. 62; *M'Donald v. Lindall*, 3 Rawle (Pa.), 492; *Leonard v. Leonard*, 2 Allen (Mass.), 543.

⁴ *De Camp v. Thompson*, 16 N. Y. App. Div. 528, 531.

⁵ *Schmidt v. Quinn*, 136 Mass. 575; *Paine v. Chandler*, 134 N. Y. 385; *O'Rorke v. Smith*, 11 R. I. 259; *Thompson v. Miner*, 30 Iowa, 386.

⁶ *Pettingill v. Porter*, 8 Allen (Mass.), 1, 6; *Paine v. Chandler*, 134 N. Y. 385; *Smith v. Griffin*, 14 Colo. 429; *Oliver v. Pitman*, 98 Mass. 46, 50; *Goodall v. Godfrey*, 53 Vt. 219.

§ 145. **Termination of Ways of Necessity — Their Suspension.** — All the ordinary methods of destroying and suspending easements (which methods are fully examined hereafter)¹ apply generally to a way of necessity. By clear, express contract, for example, a man may release and do away with such a privilege, even though the effect be to shut him off from all access to his own land.² But, dependent as it is upon necessity, this sort of a way has, as its own, peculiar, additional cause for ceasing to exist, the ending of the necessity. When the necessity no longer continues, the way terminates.³ This may be brought about by the opening of a public highway through or along the dominant tenement,⁴ or by the owner of that tenement acquiring another road or path over other land,⁵ or by his purchase of more land, thus enabling himself to reach an existing thoroughfare,⁶ or by the coming of the dominant and servient estates into the same hands at the same time and in the same right,⁷ or by any other transaction by which is brought to an end the necessity for the way which was impliedly granted.⁸

While a way of necessity is extinguished by the coming together of the dominant and servient estates in the same hands, at the same time and in the same right — it being often said in such a case that the right is *merged*, though the technically accurate expression is that it is *extinguished* — yet it may readily be brought again into existence and pass with the dominant estate upon the subsequent conveyance of that tenement alone to another person.⁹ So the way of necessity may be suspended for a time, as by the leasing of one tenement for a term of years or for life by the owner of the other

¹ §§ 187–195, *infra*.

² *Richards v. Attleborough Branch R. R.*, 153 Mass. 120. See *Symmes v. Drew*, 21 Pick. (Mass.) 278; *Goodall v. Godfrey*, 53 Vt. 219.

³ *Palmer v. Palmer*, 150 N. Y. 139; *Holmes v. Seeley*, 19 Wend. (N. Y.) 507; *Fritz v. Tompkins*, 41 N. Y. Supp. 985; *Rowell v. Doggett*, 143 Mass. 483, 489; *Whitehouse v. Cummings*, 83 Me. 91; *Seeley v. Bishop*, 19 Conn. 128; *Wissler v. Hershey*, 23 Pa. St. 333.

⁴ *Palmer v. Palmer*, 71 Hun. 30, *aff'd* 150 N. Y. 139; *Abbott v. Stewartstown*, 47 N. H. 228.

⁵ *Holmes v. Goring*, 2 Bing. 76; *N. Y. Life Ins. Co. v. Milnor*, 1 Barb.

Ch. (N. Y.) 353; *Viall v. Carpenter*, 14 Gray (Mass.), 126.

⁶ *Ballard v. Demmon*, 156 Mass. 449; *Baker v. Crosby*, 9 Gray (Mass.), 421; *Carbonic Acid Gas Co. v. Geysers Gas Co.*, 72 N. Y. App. Div. 304.

⁷ *Brown v. Berry*, 6 Cold. (Tenn.) 98.

⁸ *Morris v. Edgington*, 3 Taunt. 24; *Pierce v. Selleck*, 18 Conn. 321; *Nichols v. Luce*, 24 Pick. (Mass.) 102; *Gayetty v. Bethune*, 14 Mass. 49; *Alley v. Carleton*, 29 Tex. 74; *Woodr. Ways*, 72.

⁹ *Brown v. Berry*, 6 Cold. (Tenn.) 98.

tenement; and it will revive when the lease ends and the two parcels of land pass again into the possession of their different owners.¹

§ 146. **Location and Change of Ways of Necessity.** — The kind of easement now under discussion is usually, at the outset, undefined as to place. If before the conveyance of the land a convenient way had been in use for the benefit of the dominant tenement, it would ordinarily be understood that the same should be continued.² Otherwise, the parties may agree on the location of the way and may change it as often as both concur.³ But, when, as is ordinarily the case, it is to be designated anew and the parties to the purchase and sale have not agreed as to its location, the right to determine where the route shall lie rests with him over whose lands it is to be, provided that, upon request, he place it so that it shall be reasonably convenient to him by whom it is to be enjoyed.⁴ If, upon being asked to do so, the owner of the servient tenement fail to designate a suitable place for the way, the owner of the dominant tenement may locate it; but in doing so he must have due regard to the convenience and interests of the servient proprietor.⁵

As a rule, there can be only one way of necessity. And, therefore, where the grantor had been accustomed to use two different roads to the parcel of land conveyed and they both lay over other property of his own, he had the right to close one of them and leave only the other for the use of the grantee.⁶

¹ Such a right is not lost, extinguished, nor suspended by mere non-user; but, if the servient owner adversely obstruct it for the period of twenty years, it may be thereby destroyed. *Smiles v. Hastings*, 24 Barb. 44, 22 N. Y. 217. See how easements may be lost, destroyed, or suspended, §§ 187-195, *infra*.

² *Barnard v. Lloyd*, 85 Cal. 131; *Whitehouse v. Cummings*, 83 Me. 91; *Ellis v. Bassett*, 128 Ind. 118; *Chase v. Hall*, 41 Mo. App. 15. See *Bass v. Edwards*, 126 Mass. 445.

³ *Smith v. Lee*, 14 Gray (Mass.), 473; *Rumill v. Robbins*, 77 Me. 193.

⁴ *Bolton v. Bolton*, L. R. 11 Ch. Div. 968; *Capers v. Wilson*, 3 McCord (S. C.), 170; *Palmer v. Palmer*, 150 N. Y. 139; *Schmidt v. Quinn*, 136

Mass. 575; *Dunham v. Pitkin*, 53 Mich. 504; *Kripp v. Curtis*, 71 Cal. 62; *Hart v. Connor*, 25 Conn. 331; 2 Rolle Abr. pl. 17.

⁵ *Palmer v. Palmer*, 150 N. Y. 139; *Burlew v. Hunter*, 41 N. Y. App. Div. 148, 151; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 104; *Morris v. Edgington*, 3 Taunt. 24; *Holmes v. Seely*, 19 Wend. (N. Y.) 507.

⁶ *Bolton v. Bolton*, L. R. 11 Ch. Div. 968. But of course distinct parcels conveyed by the same grant may each give rise to a separate way of necessity. See *Nichols v. Luce*, 24 Pick. (Mass.) 102. In *Bolton v. Bolton* it is said that the grantor, if he keep the land-locked piece, — the dominant tenement, — may select the way.

After a way of necessity has been once designated by express agreement of the parties, or located by one and used by the other in such a manner as to imply his acquiescence, it can not be changed by either without the other's consent. The fact that the owner of such a right uses, for a considerable length of time without protest, the road or path fixed upon by the other party is usually sufficient to prove his acceptance of that particular way.¹

§ 147. **To what Extent Ways of Necessity may be used.** — When a way of necessity manifestly arises for some particular purpose only, the use of it is restricted to the accomplishment of that purpose. Thus, in a case where the land-locked property conveyed was a mill-dam and race, and the only reason for the existence of a way was to enable the grantee to make repairs to them, he was restricted to a reasonable use of the grantor's land for that one purpose, and could not prevent the latter from cultivating the soil over which the right existed, so long as this did not interfere with such enjoyment of the way.² When, however, there is no such restriction on the extent to which the owner of such easement may employ it, the law of England and of all the states of this country permits it to be used for all the purposes for which it may be required in order that there may be a full enjoyment of the dominant tenement as it is at the time of the conveyance.³ The parties contract with reference to the enclosed piece of land as it is situated when their agreement is made; and the condition of that piece at that point of time, or its condition as then clearly contemplated by them, will determine the *minimum* use to be made of the way of necessity to which the transfer gives rise. When, for example, the enclosed parcel is used for the carrying on of a particular kind of business, or is purchased with a view on the part of the grantee of conducting such business thereon, which fact is known by the grantor or reasonably presumed to be known by him, an adequate way for that purpose is implied.⁴ And, on the sale of land to one who has notice that the vendor is

¹ *Pearson v. Spencer*, 1 B. & S. 571; *Palmer v. Palmer*, 150 N. Y. 139; *Hines v. Hamburger*, 14 N. Y. App. Div. 577; *Smith v. Lee*, 14 Gray (Mass.), 473. See *Rumill v. Robbins*, 77 Me. 193; *Abbott v. Stewartson*, 47 N. H. 228.

² *M'Tavish v. Carroll*, 7 Md. 352.

³ *London v. Riggs*, L. R. 13 Ch. Div.

798; *Serff v. Acton Local Board*, L. R. 31 Ch. Div. 679; *Gayford v. Moffatt*, L. R. 4 Ch. App. 133; *Myers v. Dunn*, 49 Conn. 71; *Whittier v. Winkley*, 62 N. H. 338.

⁴ *Serff v. Acton Local Board*, L. R. 31 Ch. Div. 679.

going to divide up adjoining property into building lots in such a manner as to make a road over the property purchased practically indispensable, such road becomes a way of necessity reserved for the grantor.¹

When the law upon this topic is stated as above, the limit placed by the English courts upon the implication of the right to use ways of necessity is practically reached. But the prevailing principle in the United States is that the owner of the dominant tenement may enjoy such an easement, not only to the extent and for the purposes demanded by the situation of his property at the time of the grant, or in the way then contemplated by the parties to the transaction, but also in such manner as is requisite to the use of his land at any time for lawful objects.² "If," says the Supreme Court of New Hampshire, "the parties supposed a way passed as a necessary incident of the grant, how can it be inferred that they intended only a way for a particular purpose, when they knew the land was capable of being used for many purposes?"³ It is, accordingly, held that the proprietor of such a right, who employs his land for the erection thereon of a dwelling-house, may use the way to walk over, drive over, and haul such articles over as are required for the convenient enjoyment of the property by himself and his family. So the owner of an upper story of a building, the lower part of which belongs to another person, may use the stairways and halls through the parts below him, so far as is required for the proper enjoyment of his property, whether or not such use was contemplated at the time when the portions of the house passed into the hands of the different proprietors.⁴

A way of necessity, having been once located, can not be subsequently prolonged and increased by its owner, so as to

¹ *Davies v. Sear*, 7 Eq. 427.

² *Myers v. Dunn*, 49 Conn. 71; *Camp v. Whitman*, 51 N. J. Eq. 467.

³ *Whittier v. Winkley*, 62 N. H. 338.

⁴ *Thompson v. Miner*, 30 Iowa, 386; *Morrison v. King*, 62 Ill. 30; *Benedict v. Barling*, 79 Wis. 551; *Mayo v. Newhoff*, 47 N. J. Eq. 31; *Pierce v. Cleland*, 133 Pa. St. 189; *Nat. Exch. Bk. v. Cunningham*, 46 Ohio St. 575. It may be noted here, however, that such a way through the lower stories of a house would terminate upon the destruction of the house by accident or decay, un-

less the two owners concurred in restoring it to the same condition in which it had previously existed. Such destruction would do away with all the interest in the house of the owner of the upper part. But, if the owner of the lower part co-operated in restoring the building to its original condition, this would restore his corporeal property to the former owner of the upper portion, and with it the way through the lower stories. *Douglas v. Coonley*, 156 N. Y. 521.

become more burdensome. Thus, if a highway to which it at first leads be closed, it can not be extended over land of the grantor to another highway.¹ Nor can it be used for the benefit of land other than that for which it was originally created. If, for example, its owner purchase from a third party a lot of land adjoining that in favor of which the right exists, he must not go over the way for the purpose of reaching the newly acquired parcel, even though he attempt to do so by going first upon the land to which the way belongs.² When he passes from the latter piece to the former, the question as to whether or not he went over the way to enable him to do so is one of fact for the jury. "Did he use the way to get to the dominant estate, or was the use of it merely colorable to get to the lot beyond." If the latter, he was guilty of trespass.³

§ 148. (c) **Equitable Easements**—defined and illustrated.—From covenants or conditions in deeds, and even from oral agreements or representations, equity frequently raises or implies easements which are not recognized in a court of law. These are always negative in character. Hence, they are often designated as *negative equitable easements*. They are brought into existence and enforced by courts of equity, for the purpose of working out justice between owners of neighboring lands, and in disregard of the existence or non-existence of privity, or contractual or conventional relationship of any kind between such neighbors.⁴ Their most prominent and frequent illustration is presented by the owner of a tract of land selling it off in separate lots or parcels to different purchasers and inserting in the deeds, or otherwise imposing upon the vendees, stipulations as to the kinds of buildings which may be erected upon the property, or the trades or sorts of business which may be there carried on, or the uses in other respects to which it may be put.⁵ When such agreements evince a

¹ The remedy of the landowner, whose access to his property is thus cut off, is against the public for the damages caused by the closing of the highway. *Morse v. Benson*, 151 Mass. 440.

² *Howell v. King*, 1 Mod. 190; *Lawton v. Ward*, 1 Ld. Raym. 75; *Davenport v. Lamson*, 21 Pick. (Mass.) 72; *Greene v. Canny*, 137 Mass. 64, 69; *French v. Marstin*, 32 N. H. 316; *Wool-*

rych on Ways, p. *34. See § 198, *infra*.

³ *Skull v. Glenister*, 16 C. B. N. S. 81, 102. See *London v. Riggs*, L. R. 13 Ch. Div. 798; *N. Y. L. Ins. & T. Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353.

⁴ See definition and illustrations of privity, p. 168, note 1, *supra*.

⁵ *Equitable Life Assur. Soc. of U. S. v. Brennan*, 148 N. Y. 661; *Tobey v. Moore*, 130 Mass. 448.

uniform, general plan with respect to the manner of improvement and occupation of the land, and are not exclusively for the benefit of the grantor, but are meant to be for the advantage generally of the entire tract, equity will enjoin the breach of them by any of the grantees, upon the suit of any of the other lot owners.¹ Equitable easements may, accordingly, be defined as those rights, which a court of equity alone accords to landowners, to restrain neighboring proprietors from using their land in ways in which it might be freely employed but for the existence of restrictive covenants, conditions, or stipulations affecting beneficially and in substantially the same manner all the parcels involved. Thus, where the owner of several lots of land sold them to different purchasers, and it was stipulated in the deeds that no house to be built thereon should be set within ten feet of the line of the street, it was held that there were thereby created, in respect to the various pieces, mutual easements and servitudes, which equity would enforce, by enjoining the violation of their terms, among the grantees and their successors in interest.² So, in a case in which the covenants in the deeds were that the grantees would not erect or permit to be erected, on the property conveyed, any livery-stable, slaughter-house, etc. (enumerating various trades "offensive to the neighboring inhabitants"), each purchaser had an easement against all the other lots, to prevent their owners from establishing or maintaining any of those trades upon them.³

§ 149. **Requisites of Equitable Easements.** — It is to be noticed that equitable easements are mutual or reciprocal rights, which the landowners have, the one against the other. Each lot is a dominant tenement, as to all the others involved in the general plan, and a servient tenement in favor of each of those others. In order that such rights and duties shall spring into existence, it is necessary, *in the first place*, that the restrictions placed upon all the parcels involved in the general scheme shall be substantially the same. A lot affected by one

¹ Last preceding note.

² *Winfield v. Hennesy*, 6 C. E. Green (N. J.), 188, 190; *Tallmadge v. The East River Bank*, 26 N. Y. 105.

³ *Barrow v. Richard*, 8 Paige (N. Y.), 351. It is, in a sense, illogical to discuss equitable easements under the head of implied grant; but they are rights

implied in equity, and, although not strictly legal *grants* since law takes no cognizance of them, yet they are, so to speak, equitably implied grants arising from the severance of an entire tract, and are so similar to grants implied by law that they are best treated of in the present connection.

kind of covenant or stipulation can not enjoy an equitable easement over another, the only restrictions on which are materially different.¹ For example, where the owner of an entire block of land in New York City conveyed the lots in the westerly half of it, by deeds in all of which he inserted practically the same stringent covenant against nuisances, and then sold the lots in the easterly half to purchasers, in whose deeds he put different and less exacting restrictions, it was decided that the grantees of the westerly lots had no remedy against those of the easterly ones for breach of any of the covenants or conditions.²

Secondly, there must appear, either in the express terms of the agreement or by necessary implication from all the circumstances, a clear intention to establish the restriction for the benefit of the land of the person suing. In *Badger v. Boardman*,³ the first deed, which was of a house and lot, contained a covenant that no shed or outbuilding at the rear of the house should ever be built any higher than the one then existing. Subsequently the same vendor sold his other and adjoining lot to another purchaser, who sought to restrain the first vendee from increasing the height of the shed. But the court of equity refused to grant the relief asked for, because there was nothing in the deeds or circumstances of the case to show that the restriction as to the defendant's building was intended to inure to the benefit of the plaintiff or his land.⁴ "If the covenant is silent;" says the New York Court of Appeals "if there is no mutual agreement or understanding between the various owners creating an easement; if there is nothing in the surrounding circumstances from which mutual rights can be fairly inferred, then no action can be maintained."⁵

Thirdly, those against whose property the equitable easement is sought to be enforced must have notice that the re-

¹ Equitable Life Assur. Soc. of U. S. v. Brennan, 148 N. Y. 661; Everett v. Remington (1892), 3 Ch. 148; *Badger v. Boardman*, 16 Gray (Mass.), 559; *Jeffries v. Jeffries*, 117 Mass. 184; *Skinner v. Shepherd*, 130 Mass. 180; *Beale v. Case*, 138 Mass. 138.

² Equitable Life Assur. Soc. of U. S. v. Brennan, 148 N. Y. 661, 671.

³ 16 Gray (Mass.), 559.

⁴ See also *Woodhaven Junction*

Land Co. v. Solly, 148 N. Y. 42; *Sharp v. Ropes*, 110 Mass. 381.

⁵ Equitable Life Assur. Soc. of U. S. v. Brennan, 148 N. Y. 661, 672. See *Barrow v. Richards*, 8 Paige (N. Y.), 351; *Brouwer v. Jones*, 23 Barb. (N. Y.) 153; *Seymour v. McDonald*, 4 Sand. Ch. (N. Y.) 502; *Lattimer v. Livermore*, 72 N. Y. 174; *Skinner v. Shepherd*, 130 Mass. 180.

striction was intended for the benefit of the land of him who is endeavoring to assert the right. "It is not necessary in order to sustain the action that there should be privity either of estate or of contract; nor is it essential that an action at law should be maintainable on the covenant; but there must be found somewhere the clear intent to establish the restriction for the benefit of the party suing or his grantor, *of which right the defendant must have either actual or constructive notice.*"¹ And the record of the deed is sufficient notice of the existence of that right.²

§ 150. **Forms of Contract from which Equitable Easements arise.** — The most common forms of agreement from which easements are implied by courts of equity are covenants by vendees in deeds of conveyance, i. e. stipulations whereby the purchasers undertake that the property shall or shall not be used in specified ways or for designated purposes. Illustrations of these have already been given in those cases in which stand-back covenants, so-called, require any house built upon the land to be a certain distance from the street line,³ and in those restrictions against nuisances, which are so often found in deeds and which prohibit the carrying on, upon the property, of certain trades or kinds of business.⁴ When the contract takes simply the form of a covenant, and no conditional element is annexed, then, upon its breach, the grantor may either sue the grantee at law for damages or enjoin him in equity from any further violation of his agreement; but the mere infraction of a covenant by the purchaser gives no right to the vendor or those who succeed to his interests to re-enter and take back the property.⁵ Whenever, then, the stipulations in the deeds are *covenants*, each grantee has an equitable easement against his neighbors who are restricted in substantially the same manner as himself in conveyances from the same grantor.

In the few cases in which the question has been presented to the courts, it has been also held that neighboring land-

¹ Equitable Life Assur. Soc. of U. S. v. Brennan, 148 N. Y. 661, 671.

² Peck v. Conway, 119 Mass. 546. A covenant against encumbrances in a deed of conveyance is broken by the existence of an equitable easement against the property conveyed. Kramer v. Carter, 136 Mass. 504; Jeffries v. Jeffries, 117 Mass. 184.

³ Winfield v. Hennesy, 6 C. E. Green (N. J.), 188, 190; § 148, *supra*.

⁴ Barrow v. Richard, 8 Paige (N. Y.), 351; Trustees of Columbia College v. Lynch, 70 N. Y. 440; Trustees of Columbia College v. Thacher, 87 N. Y. 311; Rowland v. Miller, 139 N. Y. 93.

⁵ Stuyvesant v. Mayor, etc., 11 Paige (N. Y.), 414, 427.

owners, who claim under the same grantor and through his deeds containing similar restrictive *conditions* — i. e. stipulations upon the violation of which the grantor or his heirs may re-enter and take back the property — are entitled to equitable easements against one another and may prevent, by injunction, the breach of the conditions.¹

The principle, upon which rests the class of easements now under discussion, is that, where adjoining and neighboring lot owners are permanently bound in conscience and good morals to abstain from employing their properties in certain ways, equity will compel any one or more of them, at the suit of any other, to abstain from violating such obligation; and this without regard to any privity either of contract or of estate between the litigating parties. In applying this doctrine, the courts have gone to the full extent of holding that, although the restriction be not entered into in the form of covenant or condition, and even though it be a mere oral contract or representation, it may, nevertheless, create an equitable easement and impose a burden or servitude, provided it appear that the parties meant to establish a permanent restraint upon the use or mode of occupation of the land.² This is forcibly illustrated by the case of *Lewis v. Gollner*,³ in which the New York Court of Appeals held that an injunction was properly decreed against the erection, in a fine residential section of Brooklyn, of a tenement house, by one who had notice that her grantor had orally agreed with the neighboring lot owners, for a valuable consideration, not to erect any apartment or tenement house in that vicinity.

The only limitations upon this principle, so broadly and liberally applied by courts of equity, are that the intention of the parties, however expressed, shall be clear and explicit,⁴ that that intention shall be to impose a permanent uniform restriction upon the use or method of occupation or enjoyment of the respective parcels of land, and that he against whom

¹ *Parker v. Nightingale*, 6 Allen (Mass.), 341; *Clark v. Martin*, 49 Pa. St. 289, 290.

² *Tallmadge v. East River Bank*, 26 N. Y. 105; *Hubbell v. Warren*, 8 Allen (Mass.), 173; *Hodge v. Sloan*, 107 N. Y. 244, 250; *Hayward v. Miller*, 6 N. Y. Misc. 254; *Everett v. Remington* (1892), 3 Ch. 148.

³ 129 N. Y. 227.

⁴ It was the fact that the intention of the parties to restrict the rectangular piece of land to its use for a chapel was not sufficiently clear that caused the court to refuse the injunction prayed for in *Johnson v. Shelter Island G. & C. M. Assoc.*, 122 N. Y. 330, the facts of which are stated in § 133, *supra*.

such restriction is sought to be enforced shall have had notice of the same at the time of his purchase.

§ 151. **By and against whom Equitable Easements may be enforced.** — “There are many cases in this country and England,” says the New York Court of Appeals, “which uphold the doctrine laid down in *Tallmadge v. The East River Bank* (26 N. Y. 105) to the effect that although the legal title be absolute and unrestricted, yet the owner may, by parol contract with the purchasers of successive parcels in respect to the manner of its improvement and occupation, affect the remaining parcels with an equity requiring them also to be occupied in conformity to the general plan which is binding upon a subsequent purchaser with notice.”¹ This *dictum* expresses the limitations of the principle upon which is ascertained who may be bound by equitable easements and by whom they may be enforced. All persons who purchase lots from a common grantor with substantially the same covenants, conditions, or other restrictions in their deeds, all grantees who are affected by stipulations or representations (even though made orally) as to the use to which their land shall be put, and all those who purchase from any such owners with notice of the limitations affecting the property, are bound by such easements and may enforce them against one another. A grantor, moreover, who has conveyed parcels of land subject to uniform restrictions, which are meant to be for the benefit of an entire tract or neighborhood, impresses an equitable easement or servitude upon his remaining property, so that his vendees within any reasonable distance may restrain him from occupying or improving that which he retains otherwise than in conformity to the general plan. And this equity is binding upon all subsequent purchasers of the remaining portions, who have notice of the prior agreements, even though their legal titles be unrestricted by any express covenants or conditions.² Thus, where the vendor of a large tract of land inserted in the deeds to the purchasers of a number of the lots first sold a covenant restraining them from building any frame houses upon the land, it was held that the same restriction affected in equity the parcels which he retained, and ran with them against all who subsequently bought with

¹ *Equitable Life Assur. Soc. of U. S. v. Brennan*, 148 N. Y. 661, 672.

² *Tallmadge v. The East River Bank*, 26 N. Y. 105; *Trustees of Colum-*

bia College v. Lynch, 70 N. Y. 440, 447; *Clark v. Martin*, 49 Pa. St. 289, 290; *Parker v. Nightingale*, 6 Allen (Mass.), 341; *Pom. Eq. Jur.* § 1295.

notice of the facts.¹ And where one conveyed a house lot and inserted in the deed a condition that the grantee should not erect upon the back part of the premises any building above a designated height, the grantor then owning the adjoining lot, and the respective parcels subsequently came into the hands of new owners by grants from the parties to the first deed; it was held that, although there was no express covenant on the part of the original grantor not to build higher than he had restrained his first purchaser from building, yet, since the condition was manifestly for the benefit of both pieces, his land was also affected by it, and the owner of either lot might have a bill in equity to restrain the erection upon the other of a building above the prescribed height.² The basis of such rights is equitable estoppel; it is held in equity to be unaffected by the statutes of frauds, and the extent to which the principle will be carried and the amount of territory which will be brought within its operation in any case depend upon the sound discretion of that court.³

§ 152. **When Equitable Easements terminate.** — Equitable easements may be released, abandoned, or otherwise extinguished, in the same manner as other easements. They are sometimes destroyed, also, by a change in the neighborhood in which the land affected by them is situated. They are creatures of equity, brought into existence for the purpose of working out justice among the various parties who are bound by them and may enforce them. And, therefore, when a change in the character of the surrounding properties, or in the uses to which they are put, is such that it would no longer be right and just to enforce negative restrictive stipulations in favor of those to whom they have not been directly made, they cease to operate except for those who may maintain actions at law upon them. In other words, they cease to cause equitable easements to exist when it would no longer be equitable to imply such easements.⁴ A covenant, for example, which restrains all the lot owners in a certain prescribed section of a city from erecting upon their lands

¹ *Bimson v. Bultman*, 3 N. Y. App. Div. 198; *Turner v. Howard*, 10 N. Y. App. Div. 555; *Trustees of Columbia College v. Lynch*, 70 N. Y. 440, 447; *Pom. Eq. Jur.* § 1295.

² *Clark v. Martin*, 49 Pa. St. 289, 290.

³ *Bimson v. Bultman*, 3 N. Y. App. Div. 198.

⁴ *Trustees of Columbia College v. Lynch and Thacher*, 70 N. Y. 440, 87 N. Y. 311; *Fourth Presbyterian Church v. Steiner*, 79 Hun (N. Y.), 314; *B. E. & C. R. Co. v. N. Y. L. E. & W. R. Co.*, 123 N. Y. 316; *Holt v. Fleischman*, 75 N. Y. App. Div. 593.

any building except three story, brown stone front, private residences, may be enforced by all those for the benefit of whose land it was created, so long as that style of dwelling is suitable and in keeping with the locality. But when manufacturing or business establishments have so encroached upon this section that it would be a detriment to the property to still insist on the observance of the covenant, then equity will not grant an injunction against its breach, on the ground that any easement or servitude is to be implied.¹ A change in the character of the neighborhood, however, will not do away with equitable easements while they are still useful and important to the various lot owners, though in different ways and for different purposes from those originally intended.² And it is also to be carefully noted that no alteration in the buildings or occupations in the locality, or other change in the character of the neighborhood, will destroy the right of a grantor and those who succeed to his interest to sue *at law* for the breach of an express covenant in his deed, or to re-enter and defeat the estate of the grantee for violation of a condition therein expressed. Thus, if A convey land to B by a deed in which B covenants that certain trades or kinds of business shall not be carried on upon the premises, A and all those who succeed to his rights may always maintain an action at law against B and those in privity with him for any violation of such agreement; and this regardless of any changes that may occur in the neighborhood. Among those who succeed to A's rights under such circumstances have been classed *subsequent* purchasers of lots adjoining B's or reasonably close to the same; for in favor of such proprietors it has been held at law that the negative easements were *directly* created. But contiguous owners, who bought their parcels of A before the sale to B, and those whose lots are so situated in relation to B's that it can not be said as a matter of law that the covenant was *directly* made for their benefit, can have no remedy against B except in so far as equity affords one because it raises equitable easements; and such easements will cease to be when the working out of justice among the respective lot owners no longer requires their existence.³

¹ Trustees of Columbia College v. Lynch and Thacher, 70 N. Y. 440, 87 N. Y. 311.

² Zipp v. Barker, 40 N. Y. App. Div. 1.

³ Amerden v. Deane, 132 N. Y. 355;

It follows, moreover, from the above-stated principles, and has also been expressly decided, that if he who seeks to enjoin the breach of an equitable easement be shown to have broken the stipulation upon which it rests, or to have knowingly acquiesced in frequent violations of it by his neighbors, equity will refuse him the relief for which he prays when he asks for an injunction against its breach by others.¹

d. *Easements created by Prescription.*

§ 153. **Prescription defined and explained.** — Prescription is a mode of acquiring the ownership of incorporeal hereditaments by long-continued user or enjoyment. It originated in the desire of the courts to quiet titles, and to put an end to long and expensive litigation in cases in which the evidence adduced would be vague and unsatisfactory because of the antiquity of the facts and events with which it must attempt to deal. This judicial tendency has been the primary cause of the growth of three methods of obtaining property, which are now well established in our law, namely, by custom, by adverse possession, and by prescription. Custom is distinguished from prescription in that the former is a mere local usage, not annexed to any particular person, but belonging to the community rather than to its individuals, while the latter is a personal usage or enjoyment confined to the claimant and his ancestors or those whose estate he has acquired.² Thus, a privilege for the inhabitants of a certain town or parish to dance and play games on a particular piece of land may grow out of a custom immemorially continued;³ but if the owner of a lot of land has a right of way over his neighbor's field because he, or he and his grantors, have walked across it for many years, he is the owner of an easement founded on

Rowland v. Miller, 139 N. Y. 93, 104; People *ex rel.* Frost v. N. Y. C. & H. R. Co., 168 N. Y. 187, 194; Fourth Presbyterian Church v. Steiner, 79 Hun (N. Y.), 314. See Woodhaven Junc. L. Co. v. Solly, 148 N. Y. 42.

It follows from these principles that, when the owner of a lot of land which is encumbered by equitable easements desires to do anything thereon in violation of the restrictions, in order in doing so to become secure against subsequent attacks both at law and in equity, he

must obtain releases from all the neighboring proprietors who have a right to enforce the easements, and also from the grantor (or his successors in interest) in connection with whose deed or transfer the restrictive stipulations originated.

¹ Moore v. Murphy, 89 Hun (N. Y.), 175. See Woodhaven Junc. L. Co. v. Solly, 148 N. Y. 42.

² Blackst. Com. p. *263.

³ Fitch v. Rawling, 2 H. Blackst. 393. See § 170, *infra*.

prescription. Adverse possession differs from both custom and prescription in that it is, properly speaking, a means of acquiring title to corporeal hereditaments only, and is usually the direct result of statutes of limitations;¹ while they are the outgrowth of common-law principles, with but little aid from the legislature, and, properly speaking, have to do with the acquisition of no kind of property except incorporeal hereditaments.²

§ 154. **History and Development of Prescription.** — In the ancient common law, prescription meant the acquisition of an incorporeal hereditament by enjoying it for so long a time that there was no evidence as to when it began to be used. He who rested his claim to a right upon prescription must show immemorial enjoyment of it by himself or by those under whom he claimed — an exercise of it so long continued that “the memory of man runneth not to the contrary.”³ After the troublous times of Richard I., because of the great difficulty in tracing titles back beyond that period, it became less and less customary to attempt to do so; and, by the year 1275, the law was settled that a right might be established by prescription if its continued and uninterrupted adverse user could be shown to extend backward as far as the beginning of his reign (1189).⁴ But as this period became unreasonably long, in the lapse of years, the time necessary to raise a strict prescription was limited by a statute in the 32nd year of Hen. VIII. (1541), at sixty years;⁵ and, subsequently, the courts, finding the necessity for proving even that length of user to be inconvenient and burdensome, looked about them for some principle upon which it might be further shortened. This they obtained by inventing the fiction of a grant made and lost in modern times. And when they sought to fix a period, after the lapse of which a grant should be presumed, they found a ready analogy in the twenty years prescribed by

¹ The passing of corporeal hereditaments by adverse possession is discussed in dealing with title to real property.

² See *Boyce v. Mis. Pac. R. Co.*, 186 Mo. 583.

³ Lomax, Dig. 614, 615; Lit. § 170; Co. Lit. 115a; Termes de la Ley, title Prescription; *Mayor of Hull v. Homer*, Cowp. 102, 109.

The civil law also uses the word *prescription* to denote the means of acquiring intangible rights by long user

or enjoyment. Merlin, Répertoire de Jurisprudence, title Prescription, sect. 1; 11 Law Mag. & Rev. 109.

⁴ Jones, Ease. § 158.

⁵ *Coolidge v. Learned*, 8 Pick. (Mass.) 503, 508; *Ricard v. Williams*, 7 Wheat. (U. S.) 59; *Tyler v. Wilkinson*, 4 Mass. 402; 2 Greenl. Ev. § 539. See *Arbuckle v. Ward*, 29 Vt. 43; *Okeson v. Patterson*, 29 Pa. St. 22; *Crawson v. Primrose*, 4 Del. Ch. 643.

the Statute of Limitations (21 Jas. I. ch. 16, A. D. 1623) as the time within which one might acquire the title to corporeal hereditaments by adverse enjoyment. This length of enjoyment was accordingly settled upon in England as sufficient to establish a prescriptive right. It was adopted as a period adequate to raise a presumption of a grant which had been lost and therefore could not be produced as evidence; or, as the most modern theory is, to raise a conclusive presumption of a grant, or some other legal origin, at least twenty years old. And such is the English doctrine of to-day, according to which prescriptive easements may be created by twenty years adverse user or enjoyment of the way, drain, water-flow, or other incorporeal thing.¹ In summary, then, the ancient English doctrine, upon this topic, was the resting of title by prescription upon immemorial usage; while the modern one is based upon the conclusive presumption of a grant or other legal origin, after twenty years of uninterrupted adverse enjoyment.² The statute 2 & 3 Will. IV. ch. 71 (1832), which is known as the Prescription Act, has settled a number of questions, about which the English courts found difficulties because of the differences between the ancient theory and the modern one. That statute fixes the exact time of prescription, for certain classes of easements (the prevailing period being twenty years), and particularly prescribes what must be proved in order to establish the right to them.³

In the United States, the modern English doctrine of a

¹ *Angus v. Dalton*, L. R. 4 Q. B. Div. 162; *Bright v. Walker*, 1 Cr. M. & R. 211; *Bass v. Gregory*, L. R. 25 Q. B. Div. 481.

² *Angus v. Dalton*, L. R. 4 Q. B. Div. 162; *Bass v. Gregory*, L. R. 25 Q. B. Div. 481; *Parker v. Foote*, 19 Wend. (N. Y.) 309. For a series of years, during the progress of the changes described in the text, judges were in the habit of leaving it to juries to presume a grant, as a matter of fact, from a long exercise of an incorporeal right; and they usually adopted the period of twenty years by analogy to the statute of limitations. If one jury failed to find a grant, as a matter of fact, from such period of user, it was dismissed and another empaneled; and this process was continued until some jury concluded

as a fact, whether there were any evidence to that effect or not, that there had been a grant given and lost. But this method of apparently making the question purely one of fact to be determined by the jury was found to be too great a strain on the consciences of jurors, and was therefore abandoned in favor of the legal fiction of a grant presumed by the court. *Bass v. Gregory*, L. R. 25 Q. B. Div. 481, 484. The modern theory of conclusively presuming a grant, or some other legal origin, is discussed more at length, § 163, *infra*.

³ *Bright v. Walker*, 1 Cr. M. & R. 211, 217; *Sturges v. Bridgman*, L. R. 11 Ch. Div. 852; *Dalton v. Angus*, L. R. 6 App. Cas. 740; 1 Greenl. Ev. § 17, note 1; Tud. Lead. Cas. 14.

presumed grant or other legal origin is generally adopted; but the length of time, which must elapse before such presumption will be indulged, varies in the different states with the variations in the periods prescribed by the statutes of limitations. Thus, in Connecticut it is fifteen years, in analogy to its statute of limitations;¹ in Pennsylvania, as the result of a like analogy, it is twenty-one years;² while in New York, for a similar reason, it was formerly twenty-five years and is now twenty.³ But in some cases, in this country, the fiction of an implied grant has been repudiated and the prescriptive period made the same as that fixed by the statute of limitations, by direct analogy and without regard to any presumption as to the origin of the right.⁴ And in a few states there are special statutes dealing with the subject of the acquisition of easements by prescription.⁵ The nature of the presumption of a grant, or other legal origin, will be more fully discussed after the requisites of prescriptive easements have been examined.⁶

§ 155. **Nature of the User requisite to create Easements by Prescription.** — The user during the twenty years (or other period determined as is above explained from the statute of limitations of the state in which lies the land affected) is required by the law, in order to give rise to a prescriptive easement, to have been (a) open, visible, and notorious, (b) continuous and uniform, (c) peaceable and uninterrupted, (d) with an adverse claim of right, and (e) with the acquiescence of the owner of the land, (f) who was seised in fee and (g) who, at the time of the beginning of such enjoyment, was

¹ *Sherwood v. Burr*, 4 Day (Conn.), 244, 249; *Legg v. Horn*, 45 Conn. 409, 415.

² *Strickler v. Todd*, 10 S. & R. (Pa.) 63, 69.

³ *Gerard on Titles to Real Estate* (4th ed.), p. 759; N. Y. Code Civ. Pro. §§ 365, 366. In Arizona Territory, California, Idaho, and Nevada the period is five years; in Arkansas, Florida, and Tennessee it is seven years; in Alabama, Iowa, Mississippi, Missouri, Montana, Nebraska, New Mexico, Oregon, Texas, Washington, West Virginia, and Wyoming it is ten years; in Connecticut, Indiana, Kansas, Kentucky, Michigan, Oklahoma, Ver-

mont, and Virginia it is fifteen years; in Ohio and Pennsylvania it is twenty-one years, and in the other states it is twenty years. *Jones, Ease.* § 160, note and statutes and cases cited.

⁴ *Krier's Private Road*, 73 Pa. St. 109. See *Workman v. Curran*, 89 Pa. St. 226; *Atty.-Gen. v. Revere Rubber Co.*, 152 Mass. 444; *Schulenberg v. Zimmerman*, 86 Minn. 70.

⁵ See *Ricard v. Williams*, 20 U. S. (7 Wheat.) 59, 110; *Hazard v. Robinson*, 3 Mason (U. S. Cir. Ct.), 272. *District of Col. v. Robinson*, 180 U. S. 92; *Simpson v. Boston & M. R. Co.*, 176 Mass. 359.

⁶ § 163, *infra*.

free from disability to resist its imposition upon his property. Each of these requisites is to be briefly explained.

§ 156. (a) **The User must be Open, Visible, and Notorious.** — By this is meant that it must be of such a nature and frequency that the owner of the servient land knows, or must be reasonably presumed to know, of its existence. If, for example, the right had been claimed only once or twice during the twenty years, or the use had occurred only in the middle of the night or in some other secret manner, this would not be likely to have given any notice to the owner of the land affected, and would not be sufficient for the establishment of an easement.¹ But if the enjoyment were such that the landowner could reasonably have known of its existence, even though he had no actual knowledge thereof, that would be all in this respect that the law requires.²

§ 157. (b) **The User must be Continuous and Uniform.** — In some of the books and cases, the form of expression is that the enjoyment must have been "*continuous and uninterrupted*," that is, that it must neither have been stopped or suspended by the claimant of the right in such a manner as to indicate an abandonment, nor interfered with by the owner of the land over which the right is exercised so that the substantial continuity of the prescriptive period was broken.³ The interference by the owner of the servient land is discussed in the following section; and simply the acts and omissions of the claimant of the right, which may interrupt the running of the period of adverse user, are to be here considered. This involves inquiries as to: *first*, what is to be regarded as continuous enjoyment; *second*, how far uniform or similar in character the acts of enjoyment must be; and, *third*, how far the acts of one person may be united with those of another so as to make a continuity for the period of time required.

¹ *Gilford v. Winnepiseogee Lake Co.*, 52 N. H. 262; *Deerfield v. Coun. Riv. R. Co.*, 144 Mass. 325; *Treadwell v. Inslee*, 120 N. Y. 458; *Flora v. Carbean*, 38 N. Y. 111; *Esling v. Williams*, 10 Pa. St. 126; *Cleveland v. Ware*, 98 Mass. 409; *Dee v. King*, 73 Vt. 375.

² *O'Brien v. Goodrich*, 177 Mass. 32; *Lewis v. N. Y. & H. R. Co.*, 162 N. Y. 202; *Boyce v. Mis. Pac. R. Co.*, 168 Mo. 583. "And in cases where the enjoyment was in the beginning wrongful,

and the owner of the adjoining land may be said to have lost the full benefit of rights through his laches, it may be a fair test of whether the enjoyment was open or not to ask whether it was such that the owner of the adjoining land, but for his laches, must have known what the enjoyment was and how far it went." Lord Blackburn, in *Dalton v. Angus*, L. R. 6 App. Cas. 740, 827. See *Ward v. Warren*, 82 N. Y. 265.

³ Wash. Ease. (4th ed.) p. 167, p. *101.

First. Generally speaking, a voluntary breach of the continuity of user involves such conduct on the part of the claimant of the right as to indicate an abandonment—a giving up of the use for a time with intent not to resume the same.¹ If, because of some accident, or for the benefit or convenience of the claimant of the right, it be not exercised for some time, perhaps even for some of the years during the twenty, this would not defeat the acquisition of the easement, unless it was reasonable to presume from all the circumstances attending the cessation of the user that it was for the time being intended to be relinquished.² Whether or not such intention is to be presumed will depend, to a large extent, upon the character of the right claimed. There must, for example, be a degree of continuity in the use of a mere passageway different from that of flowing land with water, or enjoying light and air over the property of another; and the failure to employ the former for a considerable length of time would be less indicative of an intention to relinquish it than would the stopping of the latter for a much shorter period.³ In one case, the easement claimed was the right to carry on in the claimant's building a trade offensive to his neighbors; and it was held that the suspension of its exercise for two years, there having been no interference by others, was not such an interruption as to affect the right.⁴ This decision is mentioned as a border-line case. It is criticised in *Carlisle v. Cooper*,⁵ by the New Jersey court, as allowing too great a voluntary interruption of the enjoyment. And it is certainly in accordance with the weight of authority to state that from long-continued non-user alone, before the prescriptive period is complete, the courts may presume an intent to abandon the claim. Thus, where the person who claimed a right of way had passed over the land in 1819, and then again in 1824, and from then on without further intermission until 1843, it was held not to be a continuous use except from 1824.⁶ And in

¹ *Pollard v. Barnes*, 2 Cush. (Mass.) 191.

² *Earl De La Warr v. Miles*, L. R. 17 Ch. Div. 535; *Carr v. Foster*, 3 Q. B. 581; *Hall v. Augsbury*, 46 N. Y. 622; *Hesperia Land & Water Co. v. Rogers*, 83 Cal. 10; *Dana v. Valentine*, 5 Met. (Mass.) 8; *Wood v. Kelley*, 30 Me. 47; *Haog v. Delorme*, 30 Wis. 591. But see *Carlisle v. Cooper*, 4 C. E. Green

(N. J.), 256, 261; *Winnepiseogee Lake Co. v. Young*, 40 N. H. 420.

³ *Bodfish v. Bodfish*, 105 Mass. 317; *Cox v. Forrest*, 60 Md. 74.

⁴ *Dana v. Valentine*, 5 Met. (Mass.) 8, 13.

⁵ 4 C. E. Green (N. J.), 256, 261.

⁶ *Watt v. Trapp*, 2 Rich. (S. C.) 136.

the leading case of *Pollard v. Barnes*,¹ where the right contended for was to pile lumber upon another's land, and this had been enjoyed from 1822 to 1846, except between the years 1829 and 1834 when no lumber had been piled there, it was held that there had been a voluntary abandonment of the right which destroyed the continuity of its enjoyment, and that the time in favor of the claimant being limited to that from 1834 to 1843 did not constitute the requisite prescriptive period. The conclusion, to be drawn from the somewhat conflicting decisions, appears to be that all the circumstances of each case are to be investigated to ascertain the cause of the cessation of the use, and that the continuity of the enjoyment is to be regarded as broken when it is reasonable to presume, either from the length of the non-user alone, or from that element in connection with the other facts, that there was an *intention* to abandon the claim.² It is to be added that the time, from which the running of the period is to be reckoned in determining whether or not there has been a sufficient length of continuous enjoyment, is when the injury or invasion of the servient owner's right begins, and not the time when the party producing such injury begins the acts which bring about that result. Thus if one claim a prescriptive right to flow the land of another with a mill-pond, he must show, in order to sustain his contention, that the requisite period has elapsed since the dam was so far completed as to cause the flowage upon that land to begin; and he can not have the benefit of the time required for the construction of the dam, during which time the water was not raised upon his neighbor's property.³

Second. The nature and character of the acts of enjoyment must be substantially uniform and the place where they are performed must be practically the same throughout the entire twenty years, or other prescriptive period. "While the law does not require the use to be, in all respects, identical

¹ 2 Cush. (Mass.) 191.

² "A ready illustration would present itself to the mind where, from analogy to the above cases, there would seem to be no want of continuity, although the easement was but rarely used. Suppose a man had been accustomed to go across another's land to a meadow, once a year, for the purpose of cutting and bringing away the grass growing thereon, and had continued this

for twenty years or more under a claim of right, it would be sufficient, it is believed, to acquire thereby an easement of way for that purpose. Nor would this right be affected by the long intervals between the times of the user." Wash. Ease. (4th ed.) p. 169, p. *102, citing *Carr v. Foster*, 3 Q. B. 581.

³ *Branch v. Doane*, 17 Conn. 402, 18 Conn. 233; *Crosby v. Bessey*, 49 Me. 543; *Polly v. M'Call*, 37 Ala. 20.

and the same, both in manner and extent, in order to gain an easement; any material change in these respects, while the right is being gained by prescription, may defeat the same. If it shall have been actually gained, a mere failure to use it to the extent to which the right has been acquired will not affect such right."¹ It was, accordingly, decided that the New York Elevated Railroad Company had not gained a right, against the owners of lots fronting on the street over which the servitude was claimed, to continue to operate its road upon that street, by virtue of the fact that it had maintained thereon a tentative, experimental structure for eleven years, and had then taken it down and built in a different position and operated in a different manner for nine years its permanent elevated road.² So, in a case in which one flowed his neighbor's land for ten years by using a dam of a certain height, and then increased the height of the dam so that more land was covered by the water, and continued this for ten years longer, it was held that he had thereby acquired an easement over only so much of his neighbor's property as was flowed during the first ten and entire twenty years.³ It is chiefly upon this principle that the law forbids the gaining of an easement by prescription to have the boughs of a tree overhang another's land, or its roots remain imbedded therein. The growth of the tree produces a constant change in the burden and inconvenience which it imposes.⁴ But if a right be asserted and enjoyed during the entire prescriptive period, with only slight or immaterial alterations, an easement may emerge as the result.⁵ All that the law requires is that the

¹ *Ballard v. Dyson*, 1 Taunt. 279; *Cowell v. Thayer*, 5 Met. (Mass.) 253; *Homer v. Stillwell*, 35 N. J. L. 307; Wash. Ease. (4th ed.) p. 171, p. *104.

² *Amer. Bank Note Co. v. N. Y. El. R. Co.*, 129 N. Y. 252; *Homer v. Stillwell*, 35 N. J. L. 307.

³ *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167; *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 454; *Morris v. Commander*, 3 Ired. (N. C.) 510; *Wright v. Moore*, 38 Ala. 593, 598. This is an application of the principle that the extent of the easement is fixed by the user. *Tyler v. Cooper*, 47 Hun, 94, aff'd 124 N. Y. 626; *Taylor v. Millard*, 118 N. Y. 244.

⁴ *Lemmon v. Webb* (1894), 3 Ch. 1; *Norris v. Baker*, 1 Rolle, 393; *Robin-*

son v. Clapp, 65 Conn. 365. The owner of the land, into which the roots extend and over which the branches hang, may lop them off, although they have been there for twenty years; and he may do this without the necessity for giving any notice to his neighbor, the owner of the tree. *Hoffman v. Armstrong*, 48 N. Y. 201; *Dubois v. Beaver*, 25 N. Y. 123; *Lemmon v. Webb* (1894), 3 Ch. 1, 17; *Pickering v. Rudd*, 4 Camp. 219, 1 Stack. 56; *Gale, Ease.* (6th ed.) p. 461; *Jones, Ease.* § 177.

⁵ *Belknap v. Trimble*, 3 Paige (N. Y.), 577; *Davis v. Brigham*, 29 Me. 391; *Stackpole v. Curtis*, 32 Me. 383; *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 454.

adverse user shall impose substantially the same burden upon the same land during the whole of the requisite time.¹

Third. It is not necessary to the acquisition of a prescriptive easement that the user shall be by the same person during the entire period, provided the possession and enjoyment of the right have been legally continued from one owner of the dominant estate to the other.² If, for example, an ancestor use a way over his neighbor's field for twelve years, and, after his death, the heir who inherits his land continue the user for eight years more, the prescription will be complete.³ The same will be true when the successive owners of the land in favor of which the right is claimed are vendor and vendee, deviser and devisee, or otherwise related in privity of estate to each other, so that the title of one is legally derived from the other. And, in like manner, there may be three or more persons, upon each of whom in succession the title to the dominant estate devolves by some legal process, and the sum total of whose periods of enjoying the right contended for is the time necessary to cause an easement to arise.⁴ But when a succeeding holder does not claim in any way through his predecessor, as if, for example, one has disseised the other, or the first occupant has abandoned the land and the enjoyment of the right contended for, and the other has then entered and possessed both, the time of the user by one can not be tacked on to that of the other for the purpose of completing the prescriptive period.⁵

§ 158. (c) **The User must be Peaceable and Uninterrupted.**—Since the creation of an easement by prescription rests upon the presumption of a grant which has been lost and therefore can not be produced as evidence, no easement can arise in that way, if, during the time needed for its acquisition, the owner of the servient estate has interrupted the use or successfully protested against its continuance. An interruption by him consists in his cutting off and preventing the

¹ *Belknap v. Trimble*, 3 Paige (N.Y.), 577; *Bullen v. Runnels*, 2 N. H. 255; *Luttrell's Case*, 4 Rep. 87; Wash. Ease. (4th ed.) p. 172, p. *105.

² *Leonard v. Leonard*, 7 Allen (Mass.), 277; *Sargent v. Ballard*, 9 Pick. (Mass.) 251; *Williams v. Nelson*, 23 Pick. (Mass.) 141; *Cole v. Bradbury*, 86 Me. 380.

³ *Cole v. Bradbury*, 86 Me. 380;

Leonard v. Leonard, 7 Allen (Mass.), 277.

⁴ *Cole v. Bradbury*, 86 Me. 380.

⁵ *Holzman v. Douglas*, 168 U. S. 278; *Watkins v. Peck*, 13 N. H. 360; *Melvin v. Whiting*, 13 Pick. (Mass.) 184; *McFarlin v. Essex Co.*, 10 Cush. (Mass.) 304; *Okeson v. Patterson*, 29 Pa. St. 22; *Tracy v. Atherton*, 36 Vt. 503.

enjoyment for a time. However brief such an interference may be, it will stop the running of the prescriptive period. Thus, the purchaser of a mill property, which was conveyed to him by metes and bounds but at the end of which was an unfenced strip belonging to his grantor, had been accustomed for twenty years to pass regularly over a path across that strip, as the most convenient way of reaching the mill; but his grantor had occasionally piled boards and other lumber upon the path and thus closed the passageway. It was held that the owner of the mill had not obtained a right of way by prescription.¹ So when it has been necessary to employ force in order to continue the enjoyment,² or when one path or route has been exchanged for another and neither has been used for the entire requisite period,³ no easement is thereby brought into existence.⁴

The requirement that the enjoyment shall be peaceable means that it must be without any forcible resistance, or legal proceedings against it, on the part of him over whose land the right is claimed; and, in some jurisdictions, that it must be without his verbal protest or remonstrance. His commencing an action at law to recover damages for the past user, or a suit in equity to enjoin its continuation, is recognized by all the courts as an effectual interruption of the enjoyment.⁵ In some states, moreover, if he remonstrate with the claimant of the right, or forbid him to come upon the land, and do nothing more, it is held in well considered cases that this is sufficient to break the continuity of the prescriptive period.⁶ But, in the majority of the states of this

¹ *Plimpton v. Converse*, 42 Vt. 712.

² *Eaton v. Swansea Water Works Co.*, 17 Q. B. 267, 275; *Livett v. Wilson*, 3 Bing. 115; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. (U. S. Cir. Ct.) 538, 549; *Powell v. Bagg*, 8 Gray (Mass.), 441; *Lehigh Val. R. Co. v. McFarlan*, 30 N. J. Eq. 180, 43 N. J. L. 605.

The enjoyment must be *per patientiam veri domini qui seivit et non prohibuit, sed permisit de consensu tactio*. *Powell v. Bagg*, 8 Gray (Mass.), 441, 443.

³ *Total v. Bonnefoy*, 123 Ill. 653; *Peters v. Little*, 95 Ga. 151; *Pope v. Devereux*, 5 Gray (Mass.), 409; *Mason v. Davison*, 27 Nova Scotia, 84.

⁴ *Powell v. Bagg*, 8 Gray (Mass.),

441; *Pollard v. Barnes*, 2 Cush. (Mass.) 191.

⁵ *Eaton v. Swansea Water Works Co.*, 17 Q. B. 267; *Workman v. Curran*, 89 Pa. St. 226; *Postlethwaite v. Payne*, 8 Ind. 104; and see *Lanford v. Poppe*, 56 Cal. 73.

⁶ In *Powell v. Bagg*, 8 Gray (Mass.), 441, 443, which was an action against one who claimed, by virtue of twenty years' use, the right to an aqueduct over his neighbor's land, although within that time he had been denied the right by such neighbor and ordered off the premises, — *Bigelow, J.*, said: "It was not necessary for the plaintiff to commit an assault and battery on the defendant or his servants, or to use actual force to

country and the latest decisions both here and in England, such a method of interrupting the right and causing the running of the requisite time to begin *de novo* is denied; and it is held that this can be done only by some overt act of interference, other than mere words whether written or spoken.¹ In some of the states, such as Indiana, Iowa, Maine, and Massachusetts, statutes provide for notices which, when given as required by the acts, shall have the effect of interrupting or preventing the acquisition of easements by continuous enjoyment.²

§ 159. (d) **The User must be with an Adverse Claim of Right.** — It must be in opposition, express or implied, conscious or unconscious, to the owner of the land over which the right is claimed. The attitude of him who is acquiring an easement by prescription must be such that, if he were

eject them from the premises in order to disturb and break the continuity of possession or use, and prevent it from ripening into a title by lapse of time." Also *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. 538; *Livett v. Wilson*, 3 Bing. 115; *Smith v. Miller*, 11 Gray (Mass.), 145; *Workman v. Curran*, 89 Pa. St. 226; *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339; *Nichols v. Aylor*, 7 Leigh (Va.), 546; *Field v. Brown*, 24 Gratt. (Va.) 74.

¹ *Angus v. Dalton*, L. R. 6 App. Cas. 740; *Kimball v. Ladd*, 42 Vt. 747; *School District v. Lynch*, 33 Conn. 330, 334; *Demuth v. Amweg*, 90 Pa. St. 181; *Lehigh Val. R. Co. v. McFarlan*, 43 N. J. L. 605. In *Kimball v. Ladd*, the decision of *Powell v. Bagg*, *supra*, is distinguished; and in *Lehigh Val. R. Co. v. McFarlan*, the argument upon this side of the controversy is well put by Depue, J., in a passage in which he says: "If the easement has been interrupted by any act which places the owner of it in a position to sue and settle his right, if he chooses to postpone its vindication until witnesses are dead or the facts have faded from recollection, he has only his own folly and supineness to which to lay the blame. But if by mere protests and denials by his adversary, his right might be defeated, he would be placed at an unconscionable disadvantage. He could

neither sue and establish his right, nor could he have the advantage usually derived from long enjoyment in quieting titles. Protests and remonstrances by the owner of the servient tenement against the use of the easement rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruptions or obstructions of the enjoyment." Where verbal denials of the right are supported by some acts on the part of the landowner, it should ordinarily be left to the jury to decide whether or not they are sufficient to amount to an interruption and prove a want of acquiescence in the user. *Connor v. Sullivan*, 40 Conn. 26; *Wash. Ease*. (4th ed.) p. 184, p. * 113.

² Ind. 1 R. S. (1894) §§ 5746-5749; *Parish v. Kaspere*, 109 Ind. 586; *Car-gar v. Fee*, 140 Ind. 572; *Iowa, R. S.* (1888) §§ 3206-3210; *State v. Birmingham*, 74 Iowa, 407; *Maine, R. S.* (1883) ch. 105, §§ 1, 13, 14; *Cole v. Bradbury*, 86 Me. 380; *Mass. Pub. St.* (1882) ch. 196, § 1; *Hodgkins v. Farrington*, 150 Mass. 19; *Jones, Ease*. § 160, note.

asked why he was so acting, his correct answer would be that he was doing so *against*, or at least *without*, the license or consent of the owner of the servient estate.¹ When it appears that the enjoyment has been by permission asked for, or for a rent paid, or for some other equivalent rendered,² or when there is such a legal relation between the parties that the consent of the one to the acts of the other is to be presumed — as when the relation is that of landlord and tenant, or life-tenant and remainderman or reversioner³ — this ordinarily rebuts the presumption of a grant and thus destroys the foundation for a prescriptive easement. The *criterion*, upon which the American courts uniformly depend for determining whether or not the user has been adverse and under a claim of right, is well stated by the Supreme Court of South Carolina, as follows: "There must be an adverse possession or assertion of right, so as to expose the party to an action, unless he had a grant; for it is the fact of his being thus exposed to an action, and the neglect of the opposite party to bring suit, that is seized upon as the ground for presuming a grant in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to if there had not been a grant."⁴ When the acts of the one party are thus an invasion of the right of the other, they may lay the foundation for a prescriptive easement, even though they are performed in ignorance of the fact that they constitute in effect a trespass. Thus, if the owner of a parcel of land erect a house upon it in such a manner that the cornice extends over his neighbor's lot, and maintain it thus for the prescriptive period without any permission from the neighbor, he may obtain the right to have it continue in that position, even though he believed that he was building it entirely upon his own land.⁵ The actual invasion of the neighbor's right, and the absence of license or permission express or implied,

¹ *Easton v. Isted* (1903), 1 Ch. 405; *Flora v. Carbean*, 38 N. Y. 111; *Burbank v. Fay*, 65 N. Y. 57; *Morse v. Williams*, 62 Me. 445; *Blanchard v. Moulton*, 63 Me. 434; *Oliver v. Hook*, 47 Md. 301; *Rose v. City of Farmingham*, 196 Ill. 226.

² *St. Vincent Asylum v. Troy*, 76 N. Y. 108; *Crouse v. Wemple*, 29 N. Y. 540; *Boyce v. Brown*, 7 Barb. (N. Y.) 80; *Watkins v. Peck*, 13 N. H. 360;

Arnold v. Stevens, 24 Pick. (Mass.) 106; *Smith v. Miller*, 11 Gray (Mass.), 145.

³ *Gayford v. Moffatt*, L. R. 4 Ch. App. 133, 135; *Phillips v. Phillips*, 48 Pa. St. 178, 184.

⁴ *Felton v. Simpson*, 11 Ired. (N. C.) 84; *Mebane v. Patrick*, 1 Jones (N. C.), 23; *Jones, Ease.* § 165, note 3; § 163, *infra*.

⁵ *Grace M. E. Church v. Dobbins*, 153 Pa. St. 294.

together constitute an enjoyment with an adverse claim of right.

It follows that the claimant of a prescriptive right is not ordinarily required to prove a negative by directly producing evidence to the effect that his holding was without license. The fact that he has enjoyed it during the entire requisite period is in itself sufficient to raise the presumption that it was adverse.¹ If, on the other hand, his enjoyment be shown to have originated in a license, or to have been exercised at any time with the permission of the owner of the servient estate, it will be conclusively presumed to have been continued under such authority until the time at which the claimant unequivocally shows that he abandoned his license and used the right adversely.² "It is well known that a single lisp of acknowledgment by a defendant that he claims no title fastens a character upon his possession which makes it unavailable for ages."³ So, where A gave to B permission to construct and use a drain through A's soil, it was held that B's use of the same for twenty years, without more being said or indicated concerning the matter, did not create an easement in B's favor.⁴ But where it was shown that the license to construct a drain was intended to be merely temporary, and that, after the expiration of the time for which it was meant to be given by the licensor, the licensee continued to use the drain for the prescriptive period, it was held that an easement was thereby acquired.⁵

When a grant of an easement by deed is shown, there is, of course, no room for any question as to prescription.⁶ It is also held that when by parol agreement one party is authorized to enjoy *as his own* a right over the land of another, and does

¹ And the burden rests upon him who alleges that the use has been by virtue of a license or permission, to prove that fact by affirmative evidence. *Tyler v. Wilkinson*, 4 Mason (U. S. Cir. Ct.), 397; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Nichols v. Wentworth*, 100 N. Y. 455; *Ward v. Warren*, 82 N. Y. 265, affirming 15 Hun, 600; *Esling v. Williams*, 10 Pa. St. 126; *Stearns v. Jones*, 12 Allen (Mass.), 582; *Olney v. Fenner*, 2 R. I. 211; *French v. Martin*, 24 N. H. 440; *Jones, Easement*, § 186.

² *Jewett v. Hussey*, 70 Me. 433; *Arbuckle v. Ward*, 29 Vt. 43; *Legg*

v. Horn, 45 Conn. 409, 415; *Taylor v. Garrish*, 59 N. H. 560, 570; *Speir v. Town of New Utrecht*, 121 N. Y. 420; *People ex rel. Cunningham v. Osborn*, 84 Hun (N. Y.), 441, 443.

³ *Colvin v. Burnet*, 17 Wend. (N. Y.) 564, 568; *Stewart v. White*, 128 Ala. 202.

⁴ *Smith v. Miller*, 11 Gray (Mass.), 145.

⁵ *Wiseman v. Lucksinger*, 84 N. Y. 31.

⁶ *Chamber Collier Co. v. Hopwood*, L. R. 32 Ch. Div. 549; *Hoyle v. N. Y. & N. E. R. Co.*, 60 Conn. 28.

so, this makes the user adverse, and its continuation for the proper time may create an easement.¹ The user by virtue of a mere license, so that it may be said to be the enjoyment of the right of the licensor with his permission, will not lay the foundation for a prescriptive easement; but the enjoyment of the right *as his own* by the claimant of the easement will be available to support his claim, even though it originated in an oral contract with the owner of the servient estate.²

The requirement that the user shall be with an adverse claim of right involves an element sometimes stated as a distinct and independent requisite, namely, that it shall also be *exclusive*. By this is to be understood that the right must not depend for its exercise upon a similar privilege existing in others, but the claimant must enjoy it, not only adversely to the owner of the servient estate, but also independently of all other persons.³ Therefore a person can not acquire by prescription a right of way as an easement over a public highway.⁴ And when a space around a building is left open so that people generally cross it when convenient, and a neighboring proprietor uses it more frequently for that purpose than do other persons, he can not thereby obtain a prescriptive easement, unless he lays out or indicates in some manner a distinct path appropriated to the beneficial use of his own land.⁵ By the principle under discussion is not meant that a clear right of way or other private easement is to be defeated

¹ *Ashley v. Ashley*, 4 Gray (Mass.), 197; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Jewett v. Hussey*, 70 Me. 433, 443; *Arbuckle v. Ward*, 29 Vt. 43, 52; *Sumner v. Stevens*, 6 Met. (Mass.) 337.

² "The doctrine of *Ashley v. Ashley*" (4 Gray (Mass.), 197) "has been much discussed. The rule seems to be, that when the oral agreement which is followed by user amounts to a grant of the easement claimed and the grantee thereafter uses the easement, claiming it as his own, for the period of prescription, such user will give a prescriptive right to the easement; but if the parol agreement amounts merely to a license or permission to use the easement, the period of prescription does not begin to run till the licensee does some act which unequivocally shows that he abandons his license and is using the easement adversely." Wash. Ease. (4th ed.)

p. 155, p. * 89. See also *Jones*, Ease. § 179.

³ *Wheeler v. Clark*, 58 N. Y. 267; *Kilburn v. Adams*, 7 Met. (Mass.) 33; *Thomas v. Marshfield*, 13 Pick. (Mass.) 240; *Ross v. Thompson*, 78 Ind. 90.

⁴ *Hamilton v. White*, 1 Seld. (N. Y.) 9; *Driggs v. Phillips*, 103 N. Y. 77; *Glaze v. Western, etc. R. Co.*, 67 Ga. 761; *Ross v. Thompson*, 78 Ind. 90. The rights which an individual has over a public highway are not strictly speaking easements, but servitudes enjoyed by him in common with the rest of the public. But an easement may be gained across a railroad track by twenty years' enjoyment. *Fisher v. N. Y. & N. E. R. Co.*, 135 Mass 107, 108.

⁵ *Kilburn v. Adams*, 7 Met. (Mass.) 33. See *Smith v. Hughes*, 12 Vt. 113; *Curtis v. Angier*, 4 Gray (Mass.), 547.

merely because others have used the same road or enjoyed a similar right; two or more persons may each acquire, by adverse enjoyment, an independent right in the same thing :¹ but it is meant that the user must be distinct and independent, disassociated from the rights of other people and standing out by itself adverse to the rest of the world.² Thus, tenants in common of a parcel of land *may* acquire, in connection with its use, an easement over another lot belonging to one of them in severalty; but in such a case the proof on which the jury is to find the adverse character of the enjoyment must be very clear and conclusive.³ It need hardly be added that, since one can not use a thing adversely to himself, there can be no creation of an easement by prescription while both tenements are wholly possessed by the same person.⁴

§ 160. (c) **The User must be with the Acquiescence of the Owner of the Land over which the Right is claimed.** — This requirement, though frequently stated as distinct, is in reality a mere combination of two of those above discussed; namely, the enjoyment must be open, visible, and notorious, so that the landowner either knows of its existence or could reasonably do so, — so that the law treats him as having knowledge of it, — and it must be peaceable and uninterrupted. He is proved to have acquiesced when knowledge of the invasion of his right and the absence of effectual resistance of such invasion are established against him.⁵ And this is done when it is shown that the user was "*ita quod, nec per vim, nec clam, nec precario.*"⁶ As is above stated, the most recent cases both in England and in this country hold that effectual resistance is not made by mere verbal remonstrances or denials of the right, but requires either forcible opposition or proceedings in law or equity against him who is seeking to acquire the easement.⁷

¹ Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. (Mass.) 241; Kent v. Waite, 10 Pick. (Mass.) 133; Davis v. Brigham, 29 Me. 391.

² Davis v. Brigham, 29 Me. 391; Curtis v. Angier, 4 Gray (Mass.), 547; Borden v. Vincent, 24 Pick. (Mass.) 301.

³ Bradley Fish Co. v. Dudley, 37 Conn. 136.

⁴ Olney v. Gardiner, 4 M. & W. 496; Clayton v. Corby, 2 Q. B. 813; Ladyman v. Grave, L. R. 6 Ch. App. 763;

Worthington v. Gimson, 2 El. & El. 618, 624.

⁵ Wash. Ease. (4th ed.) pp. 180-184, pp. * 111- * 113.

⁶ Bract. fol. 222, D. 39, 3, 23: Co. Lit. 114 a; Eaton v. Swansea Water Works Co., 17 Q. B. 267; Solomon v. Vintner's Co., 4 H. & N. 602; Angus v. Dalton, L. R. 6 App. Cas. 740; Connor v. Sullivan, 40 Conn. 26; Kane v. Bolton, 36 N. J. Eq. 21; Workman v. Curran, 89 Pa. St. 226.

⁷ § 158, *supra*.

§ 161. (f) **The Adverse User must be against a Landowner who is seised in Fee Simple.** — Prescription operates only against one who is "capable of making a grant."¹ And since a tenant for years or for life can not grant away the interest of the remainderman or reversioner, it is uniformly held that adverse enjoyment of a right over land in possession of such a temporary holder does not create an easement that can prevail against the succeeding owner.² Where, for example, a right of way was asserted because of adverse use and enjoyment for time out of mind, over land possessed for most of the time by a tenant for ninety-nine years, whose lease had recently expired, it was held that the claim was not effectual against the owner of the inheritance.³

It is not settled by the authorities whether or not an easement may be obtained by use against a lessee or other temporary holder, while the land is in his possession. He may undoubtedly grant such a right to last during the continuance of his own estate;⁴ and it would seem that adverse enjoyment against him for twenty years ought to give rise to an easement that would continue during the residue of his term. Likewise, if the servient estate be in the possession of one who has a conditional or determinable fee therein, it is reasonable to assume that an easement might be acquired by prescription that would avail against him so long as his estate lasted, and terminate with his interest in the land.⁵ In *Wallace v. Fletcher*,⁶ it is said by Bell, J., that "the tenant for life or years may grant easements, or *permit them to be acquired by user*, and they will be valid against himself and those who hold his estate during its continuance, and perhaps not afterwards, where the reversioner had previously neither cause nor right to complain." But in *Bright v. Walker* it was decided that the adverse use of a way, with a claim of right, for a period of more than twenty years, over land in the possession of a tenant or lessee for life, gave no right in

¹ *Barker v. Richardson*, 4 Barn. & Ald. 579.

² *Bradbury v. Grimsel*, 2 Saund. 175 d; *Daniel v. North*, 11 East, 372; *Blanchard v. Bridges*, 4 Adol. & El. 176; *Sand v. Church*, 152 N. Y. 174; *Parker v. Framingham*, 8 Met. (Mass.) 260; *Pierce v. Fernald*, 26 Me. 436; *Schen-*

ley v. Commonwealth, 36 Pa. St. 29; *Portland v. Keep*, 41 Wis. 490.

³ *Wood v. Veal*, 5 Barn. & Ald. 454.

⁴ *Wheaton v. Maple* (1893), 3 Ch. 48, 63; *Wallace v. Fletcher*, 30 N. H. 453.

⁵ *Toullier*, *Droit Civil Français*, 419.

⁶ 30 N. H. 453. See *Franz v. Mendonca*, 131 Cal. 205.

the nature of an easement against either the lessor or the lessee.¹

§ 162. (g) **The Adverse User must be against an Owner of the Land who, at the Time of the Beginning of such Enjoyment, was free from Disability to resist its Imposition upon his Property.** — A grant can not be presumed to have been made by a person who was legally incapable of making it. If, therefore, the adverse enjoyment begin against one who is at the time insane, or an infant, or otherwise incapacitated to sue in his own name alone for the infraction of his right, the prescriptive period will not begin to run while such disability continues and he remains the owner of the land.² By the weight of authority it is held that no incapacity to sue, except that which existed when the adverse enjoyment commenced, will interfere with the acquisition of an easement by prescription; that the prescriptive period will begin to run as soon as that incapacity is removed or the servient estate passes into the hands of another owner in fee, and that no subsequently accruing or superimposed disability will have any effect.³ Thus, if A be an infant when B begins to use a path over his lot, a right of way may be obtained by B across the land in the time of prescription after A becomes of age, though A

¹ 1 Cr. M. & R. 211.

"On the other hand, though it is clear that a tenant for life of a dominant estate may acquire an easement in a servient one by adverse enjoyment, it does not seem to be settled whether it would, when acquired, inure in favor of him who has the inheritance by way of reversion." (Citing *Holland v. Long*, 7 Gray, 487.) "But though in the above-cited case the court avoid the question, it would seem that, if the tenant held by lease from the tenant of the fee of the dominant estate, an easement gained by such a holding by the tenant would inure to the landlord's benefit, in analogy with the doctrine of a class of cases which hold that, if a tenant by disseisin extends his holding over a neighboring parcel of land till a prescriptive title is gained, it will inure to the benefit of his landlord" (citing *Andrews v. Hailes*, 2 Ellis & B. 349, and cases therein cited). "And the head-note of *Ladyman v. Grave* is in these

words, when speaking of prescription under the statute of 2 & 3 William IV. ch. 71: '*Seemle*, the owner in fee of land demised for a term of years is subject to any right of access and use of light over his land which may be acquired by the owner of an adjoining house during the demise,'" (citing *Ladyman v. Grave*, L. R. 6 Ch. App. 763). *Wash. Ease.* (4th ed.) p. 186, pp. *115, *116.

² *McGregor v. Wait*, 10 Gray (Mass.), 72, 74; *Melvin v. Whiting*, 13 Pick. (Mass.) 184; *Watkins v. Peck*, 13 N. H. 360; *Schenley v. Commonwealth*, etc., 36 Pa. St. 29; *Reimer v. Stuber*, 20 Pa. St. 458; *City of Austin v. Hall*, 93 Tex. 591.

³ *Ballard v. Demmon*, 156 Mass. 449; *Tracy v. Atherton*, 36 Vt. 503; *Walker v. Fletcher*, 30 N. H. 434; *Melvin v. Whiting*, 13 Pick. (Mass.) 184; *Reimer v. Stuber*, 20 Pa. St. 458; *Jordeson v. S. S. & D. Gas Co.* (1899) 2 Ch. 217.

should be imprisoned after the adverse user began, and either before or after he became of age, and should become insane before his release from prison. And if A should die at any time after B began the walking over his property, and the title to the land should thus descend to A's heir or otherwise pass to another owner in fee (he being under no disability), the prescriptive period would at once begin in B's favor.¹ (a) Some courts insist, however, that no easement can arise by prescription unless he who claims it proves affirmatively that, during the whole of the requisite period, the owners of the servient estate were competent to convey a clear title thereto and to sue in their own names for any violation of their rights.²

§ 163. **Presumption of a Grant or other Legal Origin arising from Proof of the Requisite User.** — There has been much discussion, and some conflict of opinion, as to the nature of the presumption, or principle, upon which rest most of the modern decisions concerning prescriptive easements. Is it a presumption of law or of fact? Is it conclusive or disputable? Is it confined to the presumption of a grant? The summary of most of the answers of to-day on both sides of the Atlantic is that, when all the requisites of adverse user or enjoyment as described in the preceding sections have been proved, there arises a conclusive presumption of law that the claimant of the easement had at one time a right by grant, or in some other lawful form, over the servient property.³

(a) In New York the statute of limitations expressly provides, in cases of adverse possession of corporeal property, as follows: "A person can not avail himself of a disability unless it existed when his right of action or of entry accrued." "Where two or more disabilities coexist, when the right of action or of entry accrues, the limitation does not attach until all are removed." N. Y. Code Civ. Pro. §§ 408, 409.

The forms of disability which stay the running of the statutory period are infancy, insanity, and imprisonment for a term less than for life. N. Y. Code Civ. Pro. § 375; *Howell v. Leavitt*, 95 N. Y. 617; *Darrow v. Calkins*, 154 N. Y. 503, 512.

¹ *Ballard v. Demmon*, 156 Mass. 449.

² *Saunders v. Simpson*, 37 S. W. Rep. 195 (Tenn.).

³ *Angus v. Dalton*, L. R. 6 App. Cas. 740; *Campbell v. Wilson*, 3 East, 294; *Lehigh Val. R. Co. v. McFarlan*, 43 N. J. L. 605; *Pierce v. Cloud*, 42 Pa. St. 102; *Plimpton v. Converse*, 42 Vt. 712; *Webber v. Chapman*, 42 N. H. 326; *Olney v. Fenner*, 2 R. I. 211;

Boyce v. Mis. Pac. R. Co., 168 Mo. 583. "In this country the prevailing doctrine is, that an exclusive and uninterrupted enjoyment for twenty years creates a presumption, *juris et de jure*, and is conclusive of title whenever, by possibility, a right may be acquired by grant." *Depue, J.*, in *Lehigh Val. R. Co. v. McFarlan*, 43 N. J. L. 605.

Just as the statutes of limitations were at first treated as rules of disputable presumption, and were subsequently decided to be statutes of repose; so, after the ancient theory of immemorial enjoyment was discarded and the shorter period of prescription adopted, the courts at first made the proper adverse user for such time merely *prima facie* evidence of a grant, it being regarded by some as a presumption of fact and by others as a disputable presumption of law; and afterwards the most of them came to deal with it as a conclusive presumption of law.¹ It is held, however, in some of the United States, as California, Indiana, and Mississippi, that it is a rebuttable presumption, even after all the requisite facts as to the adverse enjoyment have been established.²

The inquiries in any case as to the length of the enjoyment, its nature as adverse, open, peaceable, and uninterrupted or otherwise, and whether or not the owner of the servient land acquiesced in it, or was laboring under any disability to defend his rights, all involve questions of fact, which are usually for the jury. And not until these matters have all been decided in favor of the claimant of the right is the foundation laid for a presumption of any kind.³ But when the law of a state has once settled upon any number of years — say twenty — as the prescriptive period, and in a given case in that state all those questions of fact involved in the establishment of the requisites of the adverse use have been settled

¹ Last preceding note.

² *Union Water Co. v. Cray*, 25 Cal. 504; *Postlethwaite v. Payne*, 8 Ind. 104; *Lanier v. Booth*, 50 Miss. 410; *Watkins v. Peck*, 13 N. H. 360. See *Hammond v. Zehner*, 21 N. Y. 118; *Hey v. Coleman*, 78 N. Y. App. Div. 584, 586.

³ *Angus v. Dalton*, L. R. 6 App. Cas. 740; *Lehigh Val. R. Co. v. McFarlan*, 43 N. J. L. 605; *Smith v. Miller*, 11 Gray (Mass.), 145, 148; *Garrett v. Jackson*, 20 Pa. St. 331; *Livett v. Wilson*, 3 Bing. 115; 1 Greenl. Ev. § 17.

Mr. Washburn, in his work on Easements, argues well upon this question. He says: "Any seeming discrepancy between the ancient doctrine of prescription and the modern notion of a presumed grant where the deed has been lost, as to the conclusiveness of

the evidence thereby resulting in favor of a title to incorporeal hereditaments, may be reconciled, if we bear in mind that, to constitute such a use or enjoyment as raises such presumption of a grant, requires, in addition to the requisite length of time, that it should have certain qualities and characteristics, such as being adverse, continuous, uninterrupted, and by the acquiescence of the owner of the inheritance out of or over which the easement is claimed. And if we assume that these have been established by sufficient proof, it would, doubtless, in such a case and after such a use and enjoyment, be held to create as conclusive a presumption in favor of him who makes the claim, as if it had been established by prescription in its ancient sense." *Wash. Ease.* (4th ed.) p. 129, p. *70.

in the claimant's favor, it is not only in harmony with the results of the most thoroughly considered modern cases, but also in accordance with the reasonable policy which gave rise to prescriptive titles, to insist that a *conclusive* presumption of the rightfulness of the enjoyment shall at once arise, and that evidence shall not thereafter be admitted to overthrow such conclusion or to prevent the establishment of a prescriptive easement.¹

A proper way, therefore, in which to sum up the best modern judicial thought as to the basis of prescriptive rights, seems to be to assert that it rests upon the presumption of a *lost grant*, or of *some other legal origin*. The questions as to the existence, duration, and nature of the user having all been decided in the claimant's favor, the presumption that it is founded on right is *conclusive*—*juris et de jure*.²

§ 164. **No Prescriptive Easement where no Grant can be presumed.**—Out of the narrower theory, however, that a prescriptive title must rest upon a presumed *grant*, has sprung the well-settled negative rule of law, that no easement which could not be the subject of a grant can be acquired by prescription.³ Since, therefore, a common-law grant can transfer incorporeal hereditaments only,⁴ the title to land or any interest in it can not be acquired by prescription.⁵ Any adverse possession or user, which is to pass title to corporeal hereditaments, must ordinarily find its power to do so in some statute. So, in a case in which Parliament had given

¹ The questions as to the existence, duration, and nature of the user are, of course, for the jury. The logical position is that these are to be settled before any presumption of any sort, as to the origin of the easement, is to be indulged. But, these being settled in favor of the claimant, the presumption of his right should then be conclusive. *Lehigh Val. R. Co. v. McFarlan*, 43 N. J. L. 605, 608; *Sibley v. Ellis*, 11 Gray (Mass.), 417; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Stricker v. Todd*, 10 Serg. & R. (Pa.) 63, 69; *Tracy v. Atherton*, 36 Vt. 503; *Angus v. Dalton*, L. R. 6 App. Cas. 740.

² See this exemplified in the discussion of servitudes acquired by "public prescription," §§ 168, 169, *infra*. See

also *Welsh v. Taylor*, 134 N. Y. 450; *Valentine v. Schreiber*, 3 N. Y. App. Div. 235.

³ *Lockwood v. Wood*, 6 Q. B. 31, 50, 64; *Smith v. Gatewood*, Cro. Jac. 152; *Grimstead v. Marlowe*, 4 T. R. 717; *Curtis v. Keesler*, 14 Barb. (N. Y.) 511; *Perley v. Langley*, 7 N. H. 233; *Lit. § 170*; *Co. Lit. 113 b*.

⁴ 2 Blackst. Com. p. *317.

⁵ *Luttrell's Case*, 4 Co. 87; *Potter v. North*, 1 Vent. 383, 387; *Carlyon v. Lovering*, 1 Hurl. & N. 784; *Strickler v. Todd*, 10 S. & R. (Pa.) 63, 69; *Cortelyou v. Van Brunt*, 2 Johns. (N. Y.) 357; *Gayetty v. Bethune*, 14 Mass. 49, 53; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; *Hill v. Lord*, 48 Me. 83, 96.

to a corporation the right to construct and operate a canal for public use, and an individual who for over twenty years had drawn water from the canal to run a steam-engine placed by him upon its banks pleaded a prescriptive right when sued by the company, it was held that his plea was bad, since the corporation had no power to do anything concerning the water except to use it for a canal.¹

It follows also, from the doctrine of an assumed grant or other legal origin, that an easement can not be acquired from the state by adverse enjoyment, for no presumption can run against the state.² But such rights may be gained against cities, towns, and other public or *quasi* corporations.³

¹ Rockland Canal Co. v. Radcliffe, 18 Q. B. 287; Stafford, etc. Canal v. Birmingham Canal, L. R. 1 Eng. & Ir. App. 254, 268, 278; Burbank v. Fay, 65 N. Y. 57. A prescriptive right can not be obtained to commit a nuisance. Campbell v. Seaman, 2 N. Y. Super. Ct. 231, aff'd 63 N. Y. 568; Commonwealth v. Upton, 6 Gray (Mass.), 473;

Sturges v. Bridgman, L. R. 11 Ch. Div. 852, 855; Wood on Nuisances, pp. 40, 105.

² Pa. R. Co. v. Borough of Freeport, 138 Pa. St. 91; Glaze v. Western & Atlantic R. Co., 67 Ga. 761; Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518.

³ Ibid.

CHAPTER X.

SERVITUDES THAT ARE NOT COMMON-LAW EASEMENTS.

§ 165. Servitudes — How acquired.

a. *Servitudes arising from Grant.*

§ 166. Directly created by grant.

§ 167. Easements in gross.

b. *Servitudes arising from Prescription.*

§ 168. Public prescription.

§ 169. Requisites of public prescription.

c. *Servitudes arising from Custom.*

§ 170. Creation and nature of such servitudes.

d. *Servitudes created by Dedication.*

§ 171. General requisites of dedication.

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e. *Servitudes created by Operation of Law.*

§ 177. Such servitudes explained and distinguished.

§ 178. Requisites — Public nature.

§ 179. Requisites — Compensation.

§ 180. Kinds of servitudes so created.

f. *Servitudes existing by Nature.*

§ 181. Natural servitudes — Kinds.

§ 165. **Servitudes — How acquired.** — It was explained in the last chapter that real or *prædial* servitudes, when the term is employed in the broad sense of the early common-law writers, embrace all common-law easements; all those natural, legal, and customary rights in or over land which are not franchises nor common-law easements, and which do not carry with them the privilege of taking anything from the servient land; and all forms of *profit à prendre*, or rights to take something from the servient land.¹ The preceding chapter was devoted to the acquisition and leading characteristics of the first of those groups, — the common-law easement,

¹ §§ 127–129, *supra*.

which was defined as a privilege without profit (without *profit à prendre*), created by grant or prescription, which the owner of one piece of land called the dominant tenement has over another piece of land called the servient tenement.¹

The present chapter deals with the creation and chief characteristics of the second group of rights above named, which for the sake of clearness and for want of a better distinctive term are here designated simply as *servitudes*. While commonly called easements even by the highest courts, they are clearly distinguished from common-law easements, properly so called, by the facts that they may come into existence by means other than grant or prescription, and that they do not require the existence of two distinct tenements, the one dominant and the other servient.² Illustrations of them are found in the rights enjoyed by the public in streets and highways,³ in the reciprocal privileges and duties belonging to the owners of adjacent riparian lands,⁴ and in the natural right of every owner of land to have it laterally supported by the soil of his neighbor.⁵ There are six methods by which such servitudes may exist or be brought into being; namely: *a.* By grant, in some of its forms; *b.* By prescription — public prescription; *c.* By custom; *d.* By dedication; *e.* By operation of law; and *f.* By nature. These methods are to be discussed in the order here named, and in connection with such discussion the nature and prominent features of the servitudes to which they may respectively give rise are to be examined.

a. Servitudes arising from Grant.

§ 166. **Servitudes directly created by Grant.** — In favor of a competent grantee, the owner of a parcel of land may impose

¹ § 126, *supra*.

² See § 128, *supra*, and especially *Stevens v. Met. El. R. Co.*, 130 N. Y. 95; *Bly v. Edison Electric Illum. Co.*, 172 N. Y. 1. "Such rights have some semblance to easements, and no harm or inconvenience can probably come from classifying them as such for some purposes. But they are not in fact real easements. Every easement is supposed to have its origin in grant, or prescription which presupposes a grant; and it is quite absurd to suppose that the owner of land, at the head of a stream, has an

easement by grant or prescription for its flow over the land of riparian owners for many miles to its mouth." *Earl, J.*, in *Scriber v. Smith*, 100 N. Y. 479. And see *Archer v. Archer*, 84 Hun (N. Y.), 297, 298.

³ *Iselin v. Starin*, 144 N. Y. 453.

⁴ *Brown v. Bowen*, 30 N. Y. 519; *Acquackanonck Water Co. v. Watson*, 29 N. J. Eq. 366; *Macomber v. Godfrey*, 108 Mass. 219.

⁵ *White v. Nassau Trust Co.*, 168 N. Y. 149, 155.

upon it any legal burden that he may choose to create. In order to make an *easement* in this way, he must evince a clear intent to make one lot of land subservient to another; but, when by grant a servitude which is not an easement is to arise, it is simply required that the *one piece of land* shall be encumbered with a burden for the benefit of some designated grantee.¹ This may be accomplished by a direct conveyance by the landowner of some right or privilege over his property, or by a direct reservation in a deed of the servient estate, or by a covenant or condition contained in the instrument of conveyance. The contract, however, must usually be express, when a *servitude* is to come into existence by virtue of a grant alone. When either law or equity fixes by implied grant a burden or obligation upon land, it does so in favor of some other land, to which the right is appurtenant; and thus a common-law easement is brought into existence.²

§ 167. **Easements in Gross.** — The form of servitude (outside of common-law easements) most commonly made by express grant is the so-called "easement in gross," which, as above explained, though generally called an easement, is in reality a form of servitude, but not strictly an easement, since it requires the existence of only one tenement.³ Thus, if a person who owns no land in the neighborhood be granted a right to walk over a certain lot, or a drover be deeded a permanent privilege of driving his cattle across a strip of land connecting two highways and this purely for his convenience in taking them to market and without regard to any ownership of real property by him, a servitude of this character is created.⁴

An easement in gross is so purely personal in its nature that it is not ordinarily assignable, devisable, or inheritable, and the grantee can not even permit another to enjoy it with him against the will of the grantor. In most jurisdictions it can not be made inheritable, devisable, or assignable, by any words in the deed by which it is created.⁵ But, in New York, Massachusetts, Wisconsin, and perhaps one or two

¹ § 165, *supra*.

² §§ 138-152, *supra*.

³ §§ 127, 128, *supra*.

⁴ *Ackroyd v. Smith*, 10 C. B. 164; *Lathrop v. Elsmer*, 93 Mich. 599; *Garrison v. Rudd*, 19 Ill. 558; *City of New York v. Law*, 125 N. Y. 380.

⁵ *Boatman v. Lasley*, 23 Ohio St. 614; *Moore v. Crose*, 43 Ind. 30; *Hoosier Stone Co. v. Malott*, 130 Ind. 21, 24; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; *Whaley v. Stevens*, 21 S. C. 221.

other states, it may be made transferable in these ways, by apt words used in the deed of grant.¹ Easements in gross are not favored by the law; and a grant of a right over land is presumed to be appurtenant to other land, unless the contrary is shown directly, or by necessary implication from the words of the instrument, or from the surrounding circumstances.² When it is clearly an easement in gross, if there be no explicit declaration as to how long it is to continue, it will be construed as lasting only during the life of the grantee, or for such other period as will be sufficient to carry out the purposes of the grant.³ Thus, where the right was reserved simply for the benefit of the grantor's lessee, it was held that it would end when the lease terminated.⁴ But in those states in which such rights are inheritable they may be made to last in perpetuity, if such an intention be clearly expressed.⁵

b. *Servitudes arising from Prescription.*

§ 168. **Public Prescription.** — In discussing the subject of acquiring *easements* by prescription, it was shown that the most modern theory upon which the courts rest the creation of incorporeal hereditaments through long-continued adverse user or enjoyment is the conclusive presumption of a grant or *other legal origin*.⁶ Since there can be no logical presumption of a grant to such an indefinite and constantly changing thing as the general public, the principle at the foundation of "public prescription" for streets and highways must be simply the indisputable assumption, after such rights have been enjoyed in the requisite manner for the necessary period,

¹ *City of New York v. Law*, 125 N. Y. 380, 392; *Bowen v. Conner*, 6 Cush. (Mass.) 132, 137; *Hankey v. Clark*, 110 Mass. 262; *Engel v. Ayer*, 85 Me. 448; *Paul v. Mockley*, 33 Wis. 482; *Stevenson v. Wiggin*, 56 N. H. 308; *Wash. Ease.* (4th ed.) p. 12. See *White v. Wiley*, 36 N. Y. St. Rep. 102.

² *Cadwalader v. Bailey*, 17 R. I. 495; *Dennis v. Wilson*, 107 Mass. 591; *Oswald v. Wolf*, 126 Ill. 542; *Valentine v. Schreiber*, 3 N. Y. App. Div. 235, 240; *Hopper v. Barnes*, 113 Cal. 636.

³ *McDaniel v. Walker*, 24 S. E. Rep. 378 (S. C.); *Metcalf v. Crystal*

Brook Park Ass'n, 63 N. Y. App. Div. 445.

⁴ *Russell v. Heublein*, 66 Conn. 486; *Jamaica Pond Aqueduct Co. v. Chandler*, 9 Allen (Mass.), 159, 170.

⁵ *Pinkum v. Eau Claire*, 81 Wis. 301; *Amidon v. Harris*, 113 Mass. 59; *Bank v. Miller*, 6 Fed. Rep. 545, 550. It is not technically accurate in such cases to say that the easement in gross is granted in fee, "because an easement in fee must be appurtenant to land held in fee." *Jones, Ease.* § 43; *Pinkum v. Eau Claire*, 81 Wis. 301. See *Hankey v. Clark*, 110 Mass. 262.

⁶ § 163, *supra*.

that they had a "*legal origin*" of some kind. They may have commenced as dedicated servitudes, or as rights taken by eminent domain, or otherwise. The precise nature of the origin is immaterial. The fiction is that it was a *legal* beginning of some sort, and practically all the states of this country recognize and protect the resultant highway rights and privileges.¹ Most of the cases in which servitudes have been recognized as established in this manner have dealt with streets, roads, or public ways; but in a few instances prescriptive titles to other rights of convenience or utility to the public have been upheld.² The burdens so imposed upon land are servitudes; but they are not easements, since they are enjoyed by the general public, who have no dominant estate.³

§ 169. **Requisites of Public Prescription.** — A prescriptive highway, or right to some special use of a street or road, may be established by proof that the enjoyment of it by the general public, for the requisite length of time, has been open and notorious, continuous and uniform, peaceable and uninterrupted, with an adverse claim of right, and with the acquiescence of an owner of the land who was seised in fee and who, at the time of the beginning of such enjoyment, was free from disability to resist its imposition upon his property. These essentials are stated in the same form as that in which they were above enumerated in dealing with *easements* by prescription. When they are all established, a right is ordinarily as fully and conclusively proved in the one class of cases as in the other.⁴ So, if it be shown that the public use was with

¹ Cohoes v. D. & H. Canal Co., 134 N. Y. 397; Corning v. Head, 86 Hun (N. Y.), 12; Smith v. State, 23 N. J. L. 130; Weiss v. South Bethlehem, 136 Pa. St. 294; Commonwealth v. Railroad Co., 135 Pa. St. 256; Sprow v. B. & A. R. Co., 163 Mass. 330; Pomeroy v. Mills, 3 Vt. 279; Hampson v. Taylor, 15 R. I. 83; Stevens v. Nashua, 46 N. H. 192; Campau v. Detroit, 104 Mich. 560; Wheatfield v. Grundmann, 164 Ill. 250; Shick v. Carroll Co. Comm'rs, 106 Ind. 573; Schwerdt v. Placer Co., 108 Cal. 589.

² Stedman v. Southbridge, 17 Pick. (Mass.) 162.

³ Stevens v. N. Y. El. R. Co., 130 N. Y. 95; § 165, *supra*.

⁴ "In general, it must be such as to

warrant a presumption of laying out, dedication, or appropriation, by parties having authority so to lay out, or a right to so appropriate, like that of prescription or non-appearing grant in case of individuals. It stands upon the same legal grounds, a presumption that whatever was necessary to give the legal effect and operation was rightly done, though no evidence of it can be produced except the actual enjoyment of the benefits conferred by it." Jennings v. Tisbury, 5 Gray (Mass.), 73, 74. Also District of Columbia v. Robinson, 180 U. S. 92, 98; Wheatfield v. Grundmann, 164 Ill. 250; Root v. Commonwealth, 98 Pa. St. 170; Thomas v. Ford, 63 Md. 346; Brownell v. Palmer, 22 Conn. 107; Howard v. State, 47 Ark. 431.

the license or permission of the landowner, or that it was not under a claim of right, or that it was desultory or not continued in the same manner and to the same extent throughout the entire prescriptive period, or according to the weight of authority if during part of such period the landowner were under a legal disability which existed when the adverse enjoyment began, the servitude will not be proved to have arisen.¹ But in a few states it has been held that, since prescriptive privileges in favor of the general public are not founded upon the presumption of a grant, the mere disability of the owner of the servient estate to make a grant does not stand in the way of the acquisition of such a right.²

In a few of the United States, as New York, Indiana, and California, there are statutory provisions regarding such acquisition of highways.³ These generally require that the way or street shall be specifically used *as a highway*; and, if the positive provisions of the statute be complied with, it is then generally not fatal to the acquisition of the right that the user was not wholly adverse, or that the landowner was under some legal disability to sue.⁴ (a)

(a) The New York statute (General Laws, ch. 19, being L. 1890, ch. 568, § 100) provides that "All lands which have been used by the public as a highway for the period of twenty years or more shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the commissioners of highways shall order the overseers of highways to open all such highways to the width of at least two rods." Dealing with a case arising under this act, the Court of Appeals, per Earl, J., says: "The mere fact that a portion of the public travels over a road for twenty years cannot make it a highway; and the burden of making highways and sustaining bridges cannot be imposed upon the public in that way. There must be more. The use must be like that of a highway generally. The road must not only be travelled upon, but it must be kept in

¹ *Irwin v. Dixon*, 9 How. (U. S.) 10; *Borough of Verona v. A. R. R. Co.*, 152 Pa. St. 368; *Lewis v. N. Y. L. E. & W. R. Co.*, 123 N. Y. 496; *McCleary v. Boston & M. R. Co.*, 153 Mass. 300; *Morund v. McClintock*, 150 Ill. 129; *Jones v. Phillips*, 59 Ark. 35; *Lewis v. Portland*, 25 Oreg. 133; *Edson v. Munsell*, 10 Allen (Mass.), 557; *Watkins v. Peck*, 13 N. H. 360; *Faukboner v. Corder*, 127 Ind. 164; *Reimer v. Stuber*, 20 Pa. St. 458.

² *Webber v. Chapman*, 42 N. H. 326; *Wallace v. Fletcher*, 30 N. H. 434;

Elliott on Roads, 138. And see *Speer v. New Utrecht*, 121 N. Y. 420; *Freshour v. Hihn*, 99 Cal. 443.

³ N. Y. Highway Law (General Laws, ch. 19), § 100; *Strong v. Makeever*, 102 Ind. 578; *Freshour v. Hihn*, 99 Cal. 443; *Stewart v. Frink*, 94 N. C. 487; *Commonwealth v. Kelly*, 8 Gratt. (Va.) 632.

⁴ *Ibid.*; *Speer v. New Utrecht*, 121 N. Y. 420; *People v. Underhill*, 144 N. Y. 316; *Schwerdt v. Placer Co.*, 108 Cal. 589; *Elfeit v. Stillwater R. Co.*, 53 Minn. 68.

c. *Servitudes arising from Custom.*

§ 170. **Creation and Nature of such Servitudes.** — It was stated above that "custom is distinguished from prescription in that the former is a mere local usage, not annexed to any particular person but belonging to the community rather than to its individuals, while the latter is a personal usage or enjoyment confined to the claimant and his ancestors or those whose estate he has acquired."¹ Custom, moreover, is an outcome of immemorial usage, and will not ordinarily result from proof of twenty years of adverse enjoyment.²

There have been presented to the courts very few cases in which title to incorporeal hereditaments has been held to rest on custom alone. In the rare instances in which it has given rise to servitudes, it has been shown to have continued for time out of mind in favor of a practically definite class of families or persons constituting a town, village, or other community, and to have been reasonable in purpose and scope, so as not to preclude the ordinary use of the land by its owner.³ Thus, in *Fitch v. Rawling*⁴ it was held that a custom for the inhabitants of a certain parish to enter upon a designated piece of land, at reasonable times in each and every year, and

repair or taken in charge and adopted by the public authorities. . . . A private way opened by the owners of the land through which it passes for their own use does not become a public highway merely because the public are also permitted for many years to travel over it." *Speir v. New Utrecht*, 121 N. Y. 420, 429. See also *Lewis v. N. Y. L. E. & W. R. Co.*, 123 N. Y. 496; *People v. Underhill*, 144 N. Y. 316; *People v. Osborn*, 84 Hun, 441; *Harriman v. Howe*, 78 Hun, 280; *Buffalo v. D. L. & W. R. Co.*, 39 N. Y. Supp. 4; *Davenport v. Lambert*, 44 Barb. 596.

¹ § 153, *supra*.

² *Goodman v. City of Saltash*, L. R. 7 App. Cas. 633; *Edwards v. Jenkins* (1896), 1 Ch. 308; Co. Lit. 110 b. "The same rights and privileges which may be claimed as a custom may also be claimed as a prescription. An easement upon another man's land, such as a right of way, a right to turn a plough upon another man's land, or for a fisherman to mend his nets there, a right to have a gateway, or to pass quit of toll, may be sustained as a custom, or as a prescription. If these rights are common to any manor, hundred, district, parish, or county, as a local right,

they are holden as a custom; if the same are limited to an individual and his descendants, to a body politic and its successors, or are attached to a particular estate, and are only exercised by those who have the ownership of such estate, they are holden as a prescription, which prescription is either personal in its character, or is a prescription in a *que estate*." *Perley v. Langley*, 7 N. H. 233, 235; *Knowles v. Dow*, 22 N. H. 387.

³ *Fitch v. Rawling*, 2 H. Blackst. 393; *Tyson v. Smith*, 9 Adol. & El. 406; *Gray on Perpetuities*, ch. xvii.

⁴ 2 H. Blackst. 393.

play at cricket and other games was good, and could be established against the landowner by showing that they and their ancestors had enjoyed this privilege for time whereof the memory of man ran not to the contrary. But it was declared that it could not be claimed as a good custom for all the people of England to do this, nor in favor of strangers or other persons, not residents of the parish, who happened to be there at the times when the games were played.¹ A custom for all the inhabitants of a town to go upon a certain *close* on a specified day in each year, for the purpose of horse-racing, was decided to be valid.² But the residents of a village could not thus obtain the right to go upon a piece of land, *at their pleasure*, to exercise horses³ or to play golf,⁴ since this would be unreasonable; nor could they, in this way, gain the privilege of walking or riding over a field at times in the year when the owner had corn or other annual crops growing or standing thereon, because this would tend to destroy altogether the profits of his land.⁵

Emphasis is to be laid upon the fact that a customary servitude must be confined to the inhabitants of a local district, town, or parish. Thus, it was decided in New York that the general public could not obtain a right to deposit manure, wood, and other substances on a public landing-place on the bank of a navigable stream.⁶ And in that case Chancellor Walworth says: "The law is well settled that a customary accommodation in the lands of another, to be good, must be confined to the inhabitants of a local district, and cannot be extended to the whole community or people of the State."⁷ In a country like this, where towns and villages are newer and change more rapidly than in England, while the theory of the creation of servitudes by custom may prevail, yet the circumstances which give rise to the above-enumerated requi-

¹ Also *Abbot v. Weekly*, 1 Lev. 176; *Bland v. Lipscombe*, 4 El. & B. 713, 714, note.

² *Mounsey v. Ismay*, 3 H. & C. 486.

³ *Sowerby v. Coleman*, 2 Ex. 96, 99.

⁴ *Dempster v. Cleghorn*, 2 Dow, 40, 49, 62.

⁵ *Bell v. Wardwell*, Willes, 202.

⁶ *Pearsall v. Post*, 20 Wend. (N. Y.) 111, 118. "All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath:

which last is called prescribing in a *que estate*." Chase's Blackst. p. 418. "If one claims a prescriptive right to an easement in another's land, by reason of owning or occupying land to which such right is appurtenant, he is said to claim in a *que estate*." Wash. Ease. (4th ed.) p. 18, p. *10.

⁷ *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 432; *State v. Wilson*, 42 Me. 9; *Gardiner v. Tisdale*, 2 Wis. 153; *Manning v. Wasdale*, 5 Adol. & El. 758.

sites rarely concur; and in many of the United States such rights have never been held to have been called into existence.¹ In a few states, as above shown, customary servitudes have been clearly sustained.²

d. *Servitudes created by Dedication.*

§ 171. **General Requisites of Dedication.** — Dedication is a means by which title to real property may pass from a person to the general public (or some part thereof) through an offer made by the former and accepted by the latter. Its most common operation is to impose a *servitude* upon land, as, for example, to make the soil subject to use for a highway, street, square, park, landing, or wharf.³ It is founded wholly on the doctrine of estoppel *in pais*; a representation being made by the offer of the landowner such as it is reasonable to presume was intended to be acted on by the public, and the latter reasonably acting accordingly in such a manner that injury would result to it if the representation were denied and the offer withdrawn.⁴ The discussion of servitudes created by dedication, therefore, divides itself naturally into two parts — *first*, the offer of a right over his land, made by the owner thereof to the public, and *second*, the acceptance of the offer by the public.

§ 172. **The Offer by the Landowner.** — *First.* The offer or representation may be made in any proper manner which indicates a clear intent or willingness on the part of the owner of the land to have it used by the public. A deed of the right to the public authorities, a parol declaration that

¹ *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Rose v. Bunn*, 21 N. Y. 275; *Ackerman v. Shelp*, 8 N. J. L. 125; Wash. Ease. (4th ed.) pp. 140-144, pp. *77-*80.

² *Knowles v. Dow*, 22 N. H. 387; *Nudd v. Hobbs*, 17 N. H. 524. See *Hill v. Lord*, 48 Me. 83; *Waters v. Lilley*, 4 Pick. (Mass.) 145.

³ The doctrine of the dedication of servitudes to the public is of comparatively modern date. "Thus it is stated by Gibson, C. J., in *Gowen v. Philadelphia Exchange Co.*," 5 Watts & S. (Pa.) 141 "that the doctrine of dedication to the public, without the intervention of trustees, began in 1732,

Rex v. Hudson" (2 Strange, 909), "and was next applied in *Lade v. Shepherd*, in 1735" (2 Strange, 1004). "It then slept until 1790, in the case of *Rugby v. Merryweather*" (11 East, 375). Wash. Ease. (4th ed.) p. 207, p. *131. Since the last-named date, a great many cases have been decided upon its principles; and it is now a settled doctrine in both England and America.

⁴ *Wilder v. St. Paul*, 12 Minn. 192, 200; *Thousand Is. Pk. Ass'n v. Tucker*, 173 N. Y. 203, 209; *Uhlfelder v. City of Mt. Vernon*, 76 N. Y. App. Div. 349.

the property is designed for public use, or acts, or circumstances, though nothing but silent acquiescence, are sufficient if unequivocal in character to perform that part of the process of dedication which is for the landowner.¹ The cases are numerous, for example, in which lots have been sold with reference to a map or plan, showing them to be bounded on strips of land designed for public streets, highways, squares, or other open places; and it has been held that the offer was thus made to dedicate the land so indicated.² "It is every day's practice to presume a dedication of land to the public use from an acquiescence of the owner in such use."³

The requirement must be emphasized that the overt act or tacit permission must be such that, from it, the design to make the offer to the public can be clearly and fully spelled out or presumed. It was, accordingly, decided that there was no dedication of a way, in a case in which the landowner laid out a street through his premises and graded and paved it, but erected at both ends of it gates, which were, however,

¹ Trustees, etc. v. Merryweather, 11 East, 375; McKay v. Hyde Park, 134 U. S. 84; Flack v. Green Island, 122 N. Y. 107; Matter of 160th Street, 48 Hun (N. Y.), 488; Commonwealth v. Railroad Co., 135 Pa. St. 256; Hayden v. Stone, 112 Mass. 346; Commonwealth v. Coupe, 128 Mass. 63; Wheatfield v. Grandmann, 164 Ill. 250.

² Haight v. Littlefield, 147 N. Y. 338; People v. Underhill, 144 N. Y. 316; Eckerson v. Village of Haverstraw, 6 N. Y. App. Div. 102; Price v. Plainfield, 40 N. J. L. 608; Clark v. Elizabeth, 40 N. J. L. 172; Quicksall v. Philadelphia, 177 Pa. St. 301; Ruddiman v. Taylor, 95 Mich. 547; Thaxter v. Turner, 17 R. I. 799. But the making of a plan or map of one's land, on which streets or other open places are indicated, not followed by any dealing with the land with reference to such places, does not evince an intent to dedicate them. Whitworth v. McComb, 69 Miss. 882; Vanatta v. Jones, 42 N. J. L. 561; Birmingham, etc. R. Co. v. Bessemer, 98 Ala. 274. When an owner of land thus sells it off in lots, with reference to a plan or map showing squares, streets, etc., by or along which the parcels are bounded, all the

purchasers who buy with reference to such map or plan are held to have the right to have the spaces kept open as indicated, even though the offer or representation may not be made in such a manner as to lay the foundation for a dedication to the public. Bissell v. N. Y. C. R. Co., 23 N. Y. 61; Bridges v. Wyckoff, 67 N. Y. 139; Matter of Eleventh Ave., 81 N. Y. 436; Story v. N. Y. El. R. Co., 90 N. Y. 122; Thousand Is. Pk. Ass'n v. Tucker, 173 N. Y. 203; Commonwealth v. Beaver Borough, 171 Pa. St. 542. But this last-named right is the result of an *implied grant* to such purchasers of an *easement* over such streets or places; and it is to be carefully distinguished from servitudes upon such places arising from dedication, in favor of the public. The latter rests upon *estoppel*, the former upon implied grant; the former requires the existence of two distinct tenements—the lot sold as dominant and the land over which the right exists as servient—while the latter is a burden on the one tenement only—the land over which the public have the right. See §§ 139, 140, *supra*.

³ Knight v. Heaton, 22 Vt. 480, 483.

removed for a time while the road was being finished.¹ The existence of the gates negated all presumption of an offer to the public, and their removal for a time was explained by the fact that it was done for the purpose of completing the roadway. Thus, very slight acts on the part of him over whose property the right is claimed, such as putting a fence, post, or rock in the road, or by a sign-board forbidding passage through it, will readily do away with any assumption that he meant a dedication to ensue.² And mere acquiescence by the owner of land in its occasional and varying use for travel by the public is insufficient to establish an intent to dedicate it for a street.³ Yet, since the doctrine upon which rest the principles of dedication of servitudes is estoppel *in pais*, it is to be added, as of course, that if the landowner so act as to lead the public to believe that he meant to offer it the use of his property, even though in reality he had no such intention, he will be precluded from denying the existence of a dedicated right, to the prejudice of those who have in good faith acted upon the representation so made.⁴

§ 173. **Revocation of Landowner's Offer.** — The owner of land, who has offered the use of it to the public, may withdraw the offer at any time before its acceptance, and thus prevent a dedication from ever being effectuated.⁵ His death before the public has accepted the proffered servitude is in itself a revocation.⁶ The offer, moreover, is deemed to be

¹ *Carpenter v. Gwynn*, 35 Barb. (N. Y.) 395, 406.

² "A single act of interruption by the owner is of much more weight upon the question of intention than many acts of enjoyment on the part of the public; the use without the intention to dedicate it as a public way not being a dedication." Wash. Ease. (4th ed.) p. 212, p. *135; *Poole v. Huskinson*, 11 M. & W. 827; *Roberts v. Carr*, 1 Campb. 262; *Barracrough v. Johnson*, 8 Adol. & El. 99; *Dwinel v. Barnard*, 28 Me. 554; *Commonwealth v. Newbury*, 2 Pick. (Mass.) 51; *Huffman v. Hall*, 102 Cal. 26; *Herhold v. Chicago*, 108 Ill. 467; *Hall v. Baltimore*, 56 Md. 187; *State v. Green*, 41 Iowa, 693; *Bauman v. Boeckeler*, 119 Mo. 189. So the payment of taxes on the land, as private property, militates against a presumed intent to offer it to the public; but this may be readily rebutted by other proof

that a dedication has actually occurred. *Ottawa v. Yentzer*, 160 Ill. 509; *Getchell v. Benedict*, 57 Iowa, 121; *Elsworth v. Grand Rapids*, 27 Mich. 250; *Buschman v. St. Louis*, 121 Mo. 523; *Smith v. Osage*, 80 Iowa, 84.

³ *Borough of Verona v. A. R. R. Co.*, 152 Pa. St. 368.

⁴ *Wilder v. St. Paul*, 12 Minn. 192. See *Lee v. Lake*, 14 Mich. 12, 18.

⁵ *Bridges v. Wyckoff*, 67 N. Y. 139; *Lee v. Sandy Hill*, 40 N. Y. 442; *Mark v. West Troy*, 57 N. Y. St. Rep. 323; *Chicago v. Drexel*, 141 Ill. 89; *Diamond Match Co. v. Ontonagon*, 72 Mich. 249; *People v. Dreher*, 101 Cal. 271; *Becker v. St. Charles*, 37 Mo. 13. See *Trustees v. Hoboken*, 33 N. J. L. 13; *Atty.-Gen. v. Morris*, etc. R. Co., 4 C. E. Green (N. J.), 386, 391.

⁶ *People v. Kellogg*, 67 Hun (N. Y.), 546; *Bridges v. Wyckoff*, 67 N. Y. 130; *Walker v. Townsend*, 43 Ohio St. 537.

kept open only a reasonable time; and, after that has elapsed without anything having been done on the part of the public to complete the dedication, the landowner may treat his proposition as in effect rejected, and employ his property accordingly, without the necessity for any formal revocation of his offer.¹

§ 174. **Acceptance of the Offer by the Public.** — *Second.* When the offer, still in force, is accepted by the public, the dedication becomes complete; and until that time it is merely incipient.² As is stated above, the acceptance must be made within a reasonable time after the offer, or the offer will be deemed revoked.³ All that is required to constitute the acceptance is that the public shall, in some unmistakable manner, indicate an intention to avail itself of the right tendered by the owner of the land.⁴ This is frequently done in an express contract entered into by the duly authorized public authorities and the proprietor of the servient estate. But it may also be readily accomplished by any direct dealing by such authorities with the *locus in quo*, such as grading and paving or sewerage the street, fencing in the square, or otherwise improving the place in question, so as to evince the exercise of control over it for the designated object.⁵ And, while in a few cases it has been held that acceptance requires some overt act other than mere user,⁶ yet the weight of authority, in this country at least, is to the effect that mere enjoyment by the public in the manner indicated by the offer of the servitude and so that its discontinuance would be detrimental to the public, or even enjoyment alone for a con-

¹ *Cook v. Harris*, 61 N. Y. 448; *Derby v. Alling*, 40 Conn. 410; *Crocket v. Boston*, 5 Cush. (Mass.) 182; *Bartlett v. Bangor*, 67 Me. 460; *Baker v. Johnston*, 21 Mich. 319. What constitutes a reasonable time is to be determined by the particular circumstances of each case. See *Vermont Village v. Miller*, 161 Ill. 210; *Grandville v. Jenison*, 84 Mich. 54; *Bell v. Burlington*, 68 Iowa, 296.

² *Cubitt v. Mapse*, 8 C. P. 704; *People v. Underhill*, 144 N. Y. 316; *State v. South Amboy*, 57 N. J. L. 252; *Hayden v. Stone*, 112 Mass. 346; *Dorman v. Bates Mfg. Co.*, 82 Me. 438; *Field v. Manchester*, 32 Mich. 279. If the act of the landowner alone could cause the servitude to exist, he might

sometimes impose an onerous burden upon the public without its consent.

³ § 173, *supra*.

⁴ *People v. Underhill*, 144 N. Y. 316.

⁵ *King v. Leake*, 5 Barn. & Ad. 469; *Matter of Hunter*, 164 N. Y. 365; *Hamilton v. Chicago, B. & C. R. Co.*, 124 Ill. 235; *Ross v. Thompson*, 78 Ind. 90; *Price v. Breckinridge*, 92 Mo. 378; *Hall v. Meriden*, 48 Conn. 416; *State v. Fisher*, 117 N. C. 733.

⁶ See *Green v. Canaan*, 29 Conn. 157, 163; *Guthrie v. New Haven*, 31 Conn. 308, 321; *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540. Thus, in Iowa, it is expressly provided by statute that a public way shall not be established by user alone. 1 Iowa, R. S. (1888) § 3206.

siderable length of time, finishes the dedication and makes the right and burden complete.¹ When the right is in itself essential to the public convenience, the user alone, without regard to its length, is ordinarily sufficient; but otherwise mere enjoyment is simply an item of evidence of acceptance, which may be easily overcome by counter-proof, unless it has been continued so long and under such circumstances as to make it clear that the public convenience and rights would be materially affected by its cessation.² Under such conditions it has been held that proof of user, in one case for five years,³ and in another for four years,⁴ was sufficient evidence of acceptance of the servitude. When the public would not be in any way inconvenienced by the termination of the use, then, in order to establish the right by proof of the enjoyment alone, it must be shown that it has continued for at least twenty years, or during the prescriptive period.⁵ But in such a case the servitude is in reality created by prescription and not by dedication.⁶

¹ *King v. Leake*, 5 Barn. & Ad. 469; *Green v. Canaan*, 29 Conn. 157; *Atty.-Gen. v. Abbott*, 154 Mass. 323; *Bauman v. Boeckeler*, 119 Mo. 189; *Smith v. Flora*, 64 Ill. 93; *Los Angeles Cemetery Co. v. Los Angeles*, 32 Pac. Rep. (Cal.) 240; *Buchanan v. Curtis*, 25 Wis. 99; *Kansas City Milling Co. v. Riley*, 133 Mo. 574. "Even in case an acceptance by formal adoption by the public authorities be essential, as it is in some states, in order to impose on the public the duty of maintaining and keeping in repair, yet if in fact there has been a dedication, and in the estimation of the authorities the want and convenience of the public require the land to be used for the purpose of a highway, they may use it for that purpose and thus cut off the owner from retraction." *Jones, Ease*, § 450, citing *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540; *Harrison County v. Seal*, 66 Miss. 129.

² *Matter of Beach Avenue*, 70 Hun (N. Y.), 351; *Commonwealth v. Railroad Co.*, 135 Pa. St. 256; *Detroit v. Detroit & M. R. Co.*, 23 Mich. 173; *Ramthun v. Halfman*, 58 Tex. 551; *Meiners v. St. Louis*, 130 Mo. 274.

³ *Jarvis v. Dean*, 3 Bing. 447. See

Post v. Pearsall, 22 Wend. (N. Y.) 425.

⁴ *Los Angeles Cemetery Co. v. Los Angeles*, 32 Pac. Rep. (Cal.) 240.

⁵ *Gould v. Glass*, 19 Barb. (N. Y.) 179; *Smith v. State*, 23 N. J. L. 130; *Atty.-Gen. v. Morris, etc. R. Co.*, 4 C. E. Green (N. Y.), 386, 391; *Hoole v. Atty.-Gen.*, 22 Ala. 190; *Day v. Allender*, 22 Md. 511, 526; *Hutto v. Tindall*, 6 Rich. (S. C.) 396.

⁶ "Ways by prescription and ways by dedication rest upon entirely different principles. The first is established upon evidence of user by the public, adverse and continuous for a period of twenty years or more, from which use arises a presumption of a reservation or grant and the acceptance thereof, or that it has been laid out by the proper authorities, of which no record exists. The second is created by the permission or gift of the owner, and upon the acceptance of such gift by the public authorities it becomes a way, and the owner cannot withdraw his dedication." *Commonwealth v. Coupe*, 128 Mass. 63; *Commonwealth v. Matthews*, 122 Mass. 60; *Richards v. County Commissioners*, 120 Mass. 401; *State v. Mitchell*, 58 Iowa, 567.

§ 175. **Statutory Dedication.** — In a number of the United States, most of which are in the West, there are statutes regulating the dedication of property by private persons to the public.¹ Some of them are confined to the creation of incorporeal hereditaments in this manner, while others are made broad enough to effect the transfer of corporeal property.² The prominent idea in them all is that the making, acknowledging, and filing by the landowner, of a plat or plan, upon which are shown streets, squares, parks, or other open places designed for public use, shall constitute a dedication of those places without further acts or formalities.³ Formal acceptance by the public is, under most of such statutes, not necessary to complete the dedication; but, of course, the right always exists in the local authorities to reject a proffered servitude or other property which would not be for the public convenience or utility. By some of the statutes, moreover, the method of accepting by the public is specifically outlined.⁴

In states where such means of dedication are prescribed, such, for example, as Ohio, Indiana, Illinois, Michigan, Minnesota, and California, it is uniformly held that, if the statute be not properly complied with, but all the requisites of a common-law dedication be shown to exist, a servitude may be thus established.⁵ Such special acts, therefore, do not exclude the other methods of acquiring easements and servitudes.

§ 176. **Effects of Dedication.** — In the absence of statutory modification, the ordinary results of the dedication of a servitude are that the title to the land remains as before, the right over it passes as a servitude, in favor of the public, for the

¹ *Railroad Co. v. Schurmeier*, 7 Wall. (U. S.) 272; *Vermont Village v. Miller*, 161 Ill. 210; *Marsh v. Village of Fairbury*, 163 Ill. 401; *Fulton v. Mehrenfield*, 8 Ohio St. 440; *Ruddiman v. Taylor*, 95 Mich. 547; *State v. Minneapolis & M. R. Co.*, 62 Minn. 450; *Pillsbury v. Alexander*, 40 Neb. 242; *Giffen v. Olathe*, 44 Kan. 342; *Carpentaria School District v. Heath*, 56 Cal. 478; *Evansville v. Page*, 23 Ind. 525, 527; *Callaway Co. v. Nolley*, 31 Mo. 393; *Elliott, Roads & Streets*, § 114.

² *Trustees, etc. v. Haven*, 11 Ill. 554; *Moses v. Pittsburg, etc. R. Co.*, 21 Ill. 516; *Des Moines v. Hall*, 24 Iowa, 234, 244.

³ *United States v. Illinois Cent. R. Co.*, 154 U. S. 225; *Elson v. Comstock*, 150 Ill. 303; *Carpentaria School Dist. v. Heath*, 56 Cal. 478.

⁴ *Reid v. Board of Education*, 73 Mo. 295; *Fulton v. Mehrenfield*, 8 Ohio St. 440; *Ehmen v. Guthenberg*, 50 Neb. 715; *Elson v. Comstock*, 150 Ill. 303.

⁵ *Banks v. Ogden*, 2 Wall. (U. S.) 57; *Evansville v. Page*, 23 Ind. 525, 527; *Marsh v. Fairbury*, 163 Ill. 401; *Mason v. Chicago*, 163 Ill. 351; *State v. Minneapolis & M. R. Co.*, 62 Minn. 450; *Burton v. Marx*, 38 Mich. 761; *Carpentaria School Dist. v. Heath*, 56 Cal. 478.

purposes and to the extent indicated by both the offer and the acceptance,¹ and the local public authorities thereupon become responsible for the proper care and improvement of the way, square, or other place, and liable in damages to any one rightfully there who may be injured because of its being out of repair.² The right and burden, moreover, will keep pace with any extensions or necessary changes in the land. Thus, if it be a way across a piece of land to navigable waters, it will continue to lead to those waters, though the land be extended much farther out into them either by natural causes or by the voluntary act of the owner of the soil.³

e. Servitudes created by Operation of Law.

§ 177. **Such Servitudes explained and distinguished.** — Rights that the public have in streets, parks, wharves, canals, natural streams, and the like, are very largely the results of statutes; and, when they arise in that way, they are servitudes created by operation of law. The privileges and immunities, which legislative enactments confer upon members of the public in general and, to a limited extent, upon individuals and corporations for special purposes, are as numerous and varied as the requirements and opinions of different communities. But the servitudes to which they give rise are all affected by the constitutional inhibitions against the taking of private property for public purposes without just compensation, and against the taking of such property in opposition to the will of its owner for any purposes other than those of a public nature. It is the fact, moreover, that they spring from the exercise of the right of eminent domain, either by the state generally or by some municipality or corporation upon which that right has been conferred, that distinguishes them from all other servitudes and that is to be specially noted as indicating the line of

¹ Thus the dedication may be restrictive, as for a foot-path, or for all purposes except to carry coals, etc., and the public must then confine its use to the purposes and within the limits so indicated. *Stafford v. Coyney*, 7 Barn. & C. 257; *White v. Bradley*, 66 Me. 254; *Gowen v. Phila. Exchange Co.*, 5 Watts & S. (Pa.) 141; *Hemphill v. Boston*, 8 Cush. (Mass.) 195; *State v. Trask*, 6 Vt. 355; *State v. Leverick*, 34

N. J. L. 201; *Pa. R. Co. v. Montgomery County P. R. Co.*, 167 Pa. St. 62; *O'Neil v. Sherman*, 77 Tex. 182; *Woods, Ways*, 13.

² *Mayor v. Sheffield*, 4 Wall. (U. S.) 189; *Savannah, etc. R. Co. v. Shiels*, 33 Ga. 599, 619. See *Durgin v. Lowell*, 3 Allen (Mass.), 398.

³ *Mark v. Village of West Troy*, 151 N. Y. 453.

demarkation between them and servitudes created by dedication. The latter are the outcome of an offer, voluntarily and intentionally made by the landowner,¹ while servitudes arising by operation of law are taken *in invitum* from the proprietor of the servient land.²

§ 178. **Requisites of Servitudes created by Operation of Law — Public Nature.** — The primary requisite of servitudes of this kind is that the use, for which the right is taken and the burden imposed upon the land, shall be public in its nature. By this is not meant that the enjoyment and benefit must be universal, or even extend throughout the entire state; but it is sufficient if they be such as to contribute in some measure to the progress or general welfare of the community or district in which the privilege is exercised.³ Such a use is involved, for example, in the employing of land for a highway, or a railroad, or a public park, though the chief or only benefit therefrom accrue to the residents of the town in which it is located.⁴ It is the *nature* of the use, rather than the extent to which it is applied, that determines its character; and when it is manifestly open to all, though designed primarily for the convenience of only a few individuals, or to accommodate one person more specially than others, it complies with the requirement now under discussion.⁵ It is to be added that, in some rare instances, constitutional provisions authorize the creation of such rights, against the will of the owner of the land, for private uses alone, as in New York for

¹ § 172, *supra*.

² *Matter of Townsend*, 39 N. Y. 171; *Matter of Union El. R. Co.*, 112 N. Y. 61; *In re City of Brooklyn*, 143 N. Y. 596; *Denham v. County Comm'rs*, 108 Mass. 202, 205.

³ *Beekman v. Saratoga, etc. R. Co.*, 3 Paige (N. Y.), 45, 73; *Matter of Townsend*, 39 N. Y. 171, 174; *Concord R. R. v. Greeley*, 17 N. H. 47, 61; *Cooley*, Const. Lim. 532.

⁴ *Beekman v. Saratoga, etc. R. Co.*, 3 Paige (N. Y.), 45, 73; *Boston Water Power v. B. & W. R. Co.*, 23 Pick. (Mass.) 360, 399; *Talbot v. Hudson*, 16 Gray (Mass.), 417, 421; *Olmstead v. Camp*, 33 Conn. 532; *Bankhead v. Brown*, 25 Iowa, 540, 549.

⁵ *Denham v. County Comm'rs*, 108 Mass. 202, 205. "Whether in laying out

a way the use to which it is to be appropriated is a public one, seems to be a question of law for the courts to determine. But whether the extent to which it is to be applied is sufficient to render it reasonably necessary as well as convenient to the public, is for the legislature, or their authorized agents or officers representing the public, to determine." Wash. Ease. (4th ed.) p. 454, p. *327; citing *Talbot v. Hudson*, 16 Gray (Mass.), 417, 421; *Beekman v. Saratoga, etc. R. Co.*, 3 Paige (N. Y.), 45, 73; *Inhabitants, etc. v. County Comm'rs*, 2 Met. (Mass.) 185, 188; *Tyler v. Beacher*, 44 Vt. 648; *Matter of Townsend*, 39 N. Y. 171, 174; *Allen v. Joy*, 60 Me. 124, 139; *Bankhead v. Brown*, 25 Iowa, 540, 545; *In re Fowler*, 53 N. Y. 60, 62.

private roads;¹ but in England and most of the United States such an invasion of individual rights is not permitted.²

§ 179. **Requisites of Servitudes created by Operation of Law — Compensation.** — The other distinctive requisite of servitudes created by operation of law is that just compensation shall be made to the owner of the land upon which the burden is imposed. This is to be sufficient to pay him for the value of the servitude taken, including damages for the *direct* injury which he suffers because of its creation and existence. The general principle is that compensation can not be recovered for indirect and consequential injuries which may be inflicted upon a piece of land by the invasion or taking of other private property for public purposes. Thus, when a state, or city, or town, in changing the grade of a street by proper authority, raises it above or sinks it below the level of the land of a private owner and so depreciates the value of his property, but does not specifically take any of it from him, he has ordinarily no right of action for the resulting injury.³ But the precise limitations of this principle are not easily ascertainable. There has been much divergence of opinions and decisions concerning them, especially in relation to street rights, in the different states of this country.

An abutting owner has property rights in the use of the street, which his land adjoins, for ingress and egress and for the receiving of light and air. Whether he owns any of the soil of the street or not, he is entitled to compensation in damages for any direct interference with these rights, unless it is occasioned by such uses of the street as were originally contemplated, or are necessary, appropriate, and usual for the

¹ See discussion of private roads laid out by operation of law, § 180, *infra*. N. Y. Highway Law (L. 1890, ch. 568, being Gen. L. ch. 19), §§ 106-123.

² *Wilkinson v. Leland*, 2 Pet. (U.S.) 626, 658; *Talbot v. Hudson*, 16 Gray (Mass.), 417, 421; *Bankhead v. Brown*, 25 Iowa, 540, 548. Such was the rule, also, under the constitution of New York prior to 1846. *Beekman v. Saratoga*, etc. R. Co., 3 Paige (N. Y.), 45, 73; *Matter of Townsend*, 39 N. Y. 171, 174.

³ *Radcliff's Executors v. Mayor of Brooklyn*, 4 N. Y. 195; *Coster v. Mayor of Albany*, 43 N. Y. 399; *People v. Smith*, 21 N. Y. 595; *Matter of Town-*

send, 39 N. Y. 171; *Lahr v. Met. El. R. Co.*, 104 N. Y. 268, 292; *Muhlker v. N. Y. & H. R. Co.*, 173 N. Y. 549; *Lamm v. Chicago, St. P. M. & O. R. Co.*, 45 Minn. 71; *Detroit City Railway v. Mills*, 85 Mich. 634. "In every civilized community controlled by governmental or municipal laws or regulations, there are many cases where the individual must be subjected to remote or consequential damage or loss, to which he must submit without other compensation than the benefit he derives from the social compact." *Muhlker v. N. Y. & H. R. Co.*, 173 N. Y. 549, 555.

proper enjoyment thereof by the public.¹ New uses of the street, coming within such contemplation or usage, may be authorized by legislation for the benefit of the public, without the necessity for providing for any remuneration to the abutting proprietors. "Such are the cases in respect to changes of grade; the use of a street for a surface horse railroad; the laying of sewer, gas, and water pipes beneath the soil; the erection of street lamps and hitching posts, and of poles for electric lights used for street lighting."² So the uses of a street for a surface, cable, or electric railway, provided they do not interfere with its enjoyment for ordinary street purposes, do not usually create nor take servitudes so as to bestow upon adjoining owners any right to compensation.³ But, "while the public authorities may raise the grade of a street for a street use, or may authorize the construction of a surface railroad on the street, in either case without liability to the abutters, they cannot raise the grade of a street *for the exclusive use* of a railroad without compensating an abutter for the injury inflicted."⁴ Therefore, the erection and operation of an elevated railroad on a city street, not being an improvement of the street for the benefit of the public, but rather an additional use by virtue of a right granted to a corporation, is the taking and appropriation of rights of abutting owners in such a way as to render the railroad company liable to them in damages. And the same is true of buildings erected for like purposes on streets by railroad companies, even by order of the state, so as to deprive abutters of light, air, and access. Such interference with the street rights of an adjacent owner is a taking of those rights *pro tanto*, and the value

¹ *Story v. N. Y. El. R. Co.*, 90 N. Y. 122; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; *American Bank Note Co. v. N. Y. El. R. Co.*, 129 N. Y. 252; *Fries v. N. Y. & H. R. Co.*, 169 N. Y. 270; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213; *Dill v. Camden Board of Education*, 47 N. J. Eq. 441; *Onset St. R. Co. v. County Comm'rs*, 154 Mass. 395; *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb. 559.

² *Lahr v. Met. R. Co.*, 104 N. Y. 268, 292; *Folensbee v. City of Amsterdam*, 142 N. Y. 118.

³ *Matter of Third Ave. R. Co.*, 121 N. Y. 536; *Rafferty v. Central Traction*

Co., 147 Pa. St. 579; *Lorie v. North Chicago City R. Co.*, 32 Fed. Rep. 270; *Howe v. West End St. R. Co.*, 167 Mass. 46; *Halsey v. Rapid Transit R. Co.*, 47 N. J. Eq. 380; *Hudson R. Tel. Co. v. Watervliet Turn. & R. Co.*, 135 N. Y. 394, 397; *Grand Rapids St. R. Co. v. West Side St. R. Co.*, 48 Mich. 433; *Detroit City Railway v. Mills*, 85 Mich. 634, 658. See note (a) as to New York, p. 232, *infra*.

⁴ Quoted from *Reining v. R. Co.* (128 N. Y. 157), and approved, by Parker, Ch. J., in *Muhlker v. N. Y. & H. R. Co.*, 173 N. Y. 549, 555. See *Dolan v. N. Y. & H. R. Co.*, 175 N. Y. 367.

of what is so taken, since it is not taken solely for public improvement, must be paid for; and, in connection with this, compensation must be made for the damage done to his land adjoining the street, which is the one great injury. He is paid, not for an indirect or consequential injury, but for a direct taking of property rights—servitudes—from him.¹ But owners of land not abutting on the street on which is the road can not recover compensation for any injury (for such injury is indirect) occasioned to their properties by its erection, existence, or operation.² No servitudes are thereby taken from them. There is a conflict in the decisions as to the right of adjacent owners to recover damages for injury occasioned by steam railroads on the *surface* of streets. In the majority of the United States, it is held that the construction and operation of such roads upon streets and highways, of which the ownership of the soil is in the *abutting proprietors*, is a perversion of them to a use not ordinary nor originally contemplated, and that, accordingly, such owners may have compensation for the servitudes thus taken and the consequent loss in the value of their property.³ But a few of the courts have maintained that such an employment of a highway is

¹ *Bohn v. Met. El. R. Co.*, 129 N. Y. 576; *Kane v. N. Y. El. R. Co.*, 125 N. Y. 164; *Abendroth v. Manhattan R. Co.*, 122 N. Y. 1; *Lahr v. Met. El. R. Co.*, 104 N. Y. 268; *Drucker v. Manhattan R. Co.*, 106 N. Y. 157; *Story v. N. Y. El. R. Co.*, 90 N. Y. 122; *Muhlker v. N. Y. & H. R. Co.*, 173 N. Y. 549, 556; *Dolan v. N. Y. & H. R. Co.*, 175 N. Y. 367, 370; *Pa. R. Co. v. Duncan*, 111 Pa. St. 352. The damages, in such cases, include the amount by which the value of the abutting property is decreased by the construction and operation of the road, because of the loss to it of access, light, and air and the injury caused to it by noise, loss of privacy, etc. *Woolsey v. N. Y. El. R. Co.*, 134 N. Y. 323; *Rumsey v. N. Y. & N. E. R. Co.*, 133 N. Y. 79, 136 N. Y. 543; *Buffalo v. N. Y. El. R. Co.*, 138 N. Y. 257; *Bookman v. N. Y. El. R. Co.*, 137 N. Y. 302, 147 N. Y. 298; *Robinson v. N. Y. El. R. Co.*, 175 N. Y. 219; *N. Y. El. R. Co. v. Fifth Nat. Bk.*, 135 U. S. 432; *Lamm v. Chicago*, etc. R. Co., 45 Minn. 71. A purchaser in fee of the abutting property, after the construction of the road, may maintain

an action for the continued injury to his rights caused by its operation after his purchase. *Werfelman v. Manhattan R. Co.*, 11 N. Y. Supp. 66, 32 N. Y. St. Rep. 682; *Glover v. Manhattan R. Co.*, 19 J. & S. (N. Y.) 1; *Mitchell v. Met. El. R. Co.*, 9 N. Y. Supp. 829, 31 N. Y. St. Rep. 625; *Beach v. W. & W. R. Co.*, 120 N. C. 498. But he has no right of action for the construction of the road and its operation before his purchase. Such cause of action does not run with the land. *Galt v. Chicago & N. W. R. Co.*, 157 Ill. 125. See *Shepard v. Man. El. R. Co.*, 169 N. Y. 160; *W. U. Tel. Co. v. Shepard*, 169 N. Y. 170.

² *Ibid.* Especially *Story v. N. Y. El. R. Co.*, 90 N. Y. 122; *Reilly v. Man. El. R. Co.*, 43 N. Y. App. Div. 80.

³ *Williams v. N. Y. Cent. R. Co.*, 16 N. Y. 97; *Henderson v. N. Y. Cent. R. Co.*, 78 N. Y. 423; *People v. Kerr*, 27 N. Y. 188; *Kelsey v. King*, 33 How. Pr. (N. Y.) 39; *Chamberlain v. Elizabethport*, S. C. Co., 41 N. J. Eq. 43; *Commonwealth v. Allen*, 148 Pa. St. 358; *Onset R. Co. v. County Comm'rs*, 154 Mass. 395; *Western R. Co. v. Ala.*

ordinary and reasonable and does not give rise to any cause of action for damages.¹ The courts of New York, Michigan, Illinois, Tennessee, and a few other states have decided that a steam railroad may be authorized upon the surface of streets, the soil of which the *city* owns, without the necessity of making compensation to the abutting owners, provided the grade of the street is not changed, and it is left substantially free and unobstructed for the purposes of ordinary travel.² (a) In some

(a) The New York courts have decided, as to both steam and horse railroads on the surface of a street, that they constitute an additional burden (and in that sense take property) for which compensation must be made to the abutter, *if he own the soil of the street*. But if he do not own that soil, the damages are only consequential and call for no compensation, unless the appropriation and use of the street become so great and annoying as to degenerate into a nuisance. The elevated railroad cases, beginning with *Story v. N. Y. El. R. Co.*, 90 N. Y. 122, do not run counter to this distinction; but add an element to it, by holding that the elevated structures, being for the benefit of the railroad companies and not erected "to improve the street for the benefit of the public," result in *direct* taking of servitudes of light, air, and access, for which compensation must be made to the abutters, even though they own none of the soil of the street. *Fobes v. R. W. & O. R. Co.*, 121 N. Y. 505; *Reining v. N. Y. L. E. & W. R. Co.*, 128 N. Y. 157; *Kane v. N. Y. El. R. Co.*, 125 N. Y. 164; *Fries v. N. Y. & H. R. Co.*, 169 N. Y. 276; *Muhlker v. N. Y. & H. R. Co.*, 173 N. Y. 549; *Dolan v. N. Y. & H. R. Co.*, 175 N. Y. 367.

G. T. R. Co., 96 Ala. 272; *Reichert v. St. L. & S. F. R. Co.*, 51 Ark. 491; *Weyl v. S. V. R. Co.*, 96 Cal. 202; *Imlay v. Union B. R. Co.*, 26 Conn. 249; *F. S. R. Co. v. Brown*, 23 Fla. 104; *S. Car. R. Co. v. Steiner*, 44 Ga. 546; *Galt v. Chicago & N. W. R. Co.*, 157 Ill. 125; *Burkam v. O. & M. R. Co.*, 122 Ind. 344; *Barb Wire Co. v. C. B. & Q. R. Co.*, 70 Iowa, 105; *Chicago K. & W. R. Co. v. Woodward*, 47 Kan. 191; *Phipps v. West Md. R. Co.*, 66 Md. 319; *Taylor v. Bay City St. R. Co.*, 101 Mich. 140; *Gustavson v. Hamm*, 56 Minn. 334; *St. Louis Transfer Co. v. L. M. B. Co.*, 111 Mo. 666; *Omaha & N. P. R. Co. v. Janecek*, 30 Neb. 276; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168; *Railroad Co. v. Bingham*, 87 Teun. 522; *G. C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *Hodges v. S. R. Co.*, 88 Va. 653; *Taylor v. Chicago, M. & St. P. R. Co.*, 83 Wis. 636.

¹ *Elizabethtown & P. R. Co. v. Thompson*, 79 Ky. 52; *Fulton v. S. R.*

R. T. Co., 85 Ky. 640; *Hill v. Chicago, St. L. & N. O. R. Co.*, 38 La. Ann. 599; *Arbenz v. W. & H. R. Co.*, 33 W. Va. 1; *McLaughlin v. C. & S. C. R. Co.*, 5 Rich. L. (S. C.) 583. See *Macomber v. Nichols*, 34 Mich. 212; *Montgomery v. S. A. W. R. Co.*, 104 Cal. 186, 192; *Knapp v. St. L. T. R. Co.*, 126 Mo. 26.

² This question has arisen most prominently in reference to the City of New York, which owns in fee simple the soil of many of its streets on Manhattan Island. *Fobes v. Rome, W. & O. R. Co.*, 121 N. Y. 505; *Reining v. N. Y. L. & W. R. Co.*, 128 N. Y. 157; *Bloodgood v. Mohawk & H. R. Co.*, 18 Wend. (N. Y.) 9; *People v. Kerr*, 27 N. Y. 188; *Kane v. N. Y. El. R. Co.*, 125 N. Y. 164; *G. R. & I. R. Co. v. Heisel*, 38 Mich. 62; *Olney v. Wharf*, 115 Ill. 519; *Railroad Co. v. Bingham*, 87 Tenn. 522; *C. N. & S. W. R. Co. v. Mayor*, 36 Iowa, 299; *Hogan v. Cent. Pac. R. Co.*, 71 Cal. 83; *K. N. & D. R. Co. v. Cuykendall*, 42 Kan. 234; *Arbens v. Wheeling & H. R. Co.*, 33 W. Va. 1.

of the states, however, such as Minnesota, Ohio, and Texas, the owners of the adjacent lands are given the same remedies for injury to their properties because of such a railroad, whether or not the city owns the soil of the highway on which it is located.¹ There is a similar conflict of authority as to the effect of the placing of telegraph and telephone poles and wires upon streets and highways; it being insisted in some states, such as New York and Illinois, that compensation for such use of the way need not be made to abutting proprietors unless their properties are unnecessarily injured,² while in other jurisdictions, of which New Jersey and Michigan are illustrations, the existence of such poles and wires *per se* affords ground for the recovery of damages.³

§ 180. **Kinds of Servitudes created by Operation of Law.** — While the kinds of servitudes which arise by operation of law are numerous and varied, the most important and frequently employed of these are roads and ways acquired by corporations, such as turnpike, canal, and railroad companies; public highways; private roads laid out by public authority; public rights in non-navigable streams and waters, and special provisions as to buildings and walls in large cities.

Incorporated companies, such as railroad and turnpike corporations which need the use of large tracts of land for the carrying on of their business, are ordinarily given, by either general or special legislation, the power to exercise the right of eminent domain; and under that authority they acquire roads and ways, in a *quasi*-public capacity and for uses of a public nature.⁴ They take, as a rule, not the ownership of the soil and corporeal hereditaments, but simply servitudes in the form of road and street rights and privileges. The

¹ *Carli v. V. D. Co.*, 32 Minn. 101; *Schurmeir v. St. P. & P. R. Co.*, 10 Minn. 82; *L. M. R. Co. v. Hambleton*, 40 Ohio St. 496; *S. V. R. Co. v. Lawrence*, 38 Ohio St. 41; *Cincinnati, etc. R. Co. v. Cummins*, 14 Ohio St. 523, 541; *G. C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *B. & M. R. Co. v. Reinack*, 15 Neb. 279; *Dooly Block v. Rapid Tr. Co.*, 9 Utah, 31.

² *Eels v. Amer. T. & T. Co.*, 143 N. Y. 133; *Blashfield v. Empire St. T. & T. Co.*, 18 N. Y. Supp. 250; *Pacific P. Tel. Cable Co. v. Irvine*, 49 Fed. Rep. 113; *Board of Trade Tel. Co. v. Bar-*

nett, 107 Ill. 507; *West U. Tel. Co. v. Williams*, 86 Va. 696; *Stowers v. Postal T. C. Co.*, 68 Miss. 559; *Willis v. Erie T. & T. Co.*, 37 Minn. 347; *Gorham v. Eastchester Electric Co.*, 80 Hun (N. Y.), 290; *Daily v. State*, 51 Ohio St. 348.

³ *Dean v. Ann Arbor St. Ry. Co.*, 93 Mich. 330; *Erwin v. Cent. U. Tel. Co.*, 148 Ind. 365. In New Jersey, a statute requires compensation to be made in such cases. *Winter v. N. Y. & N. J. Tel. Co.*, 51 N. J. L. 83; *Broome v. N. Y. & N. J. Tel. Co.*, 49 N. J. L. 624; *Roake v. Amer. Tel. Co.*, 41 N. J. Eq. 35.

⁴ *Stim. Amer. Stat. L.* § 1141.

proceedings for this purpose usually consist of an application to the court, upon due notice to all persons interested in the land to be affected, which, if successful, results in a judgment or decree to the effect that, upon making just compensation to such persons, the corporation shall take the property for the uses and purposes mentioned in its application. Commissioners are then appointed by the court, who view the land, receive evidence as to its value, and determine upon the amount of compensation to be paid; and, upon having their report confirmed, and making or providing for the payments thereby required, the applicant becomes entitled to the enjoyment of the land.¹ (a)

(a) The general provisions of the New York statutes as to the condemnation and taking of private property for public purposes are found in the N. Y. Code of Civil Procedure, §§ 3357-3384, which may be summarized as follows: The proceeding must be commenced by verified petition to the Supreme Court, presented by the person, corporation, officer, or institution entitled to take the property, who is called the plaintiff. The petition must describe the plaintiff; give a description, by metes and bounds, with reasonable certainty, of the property to be taken and state its value; give the names and places of residence of the owners of the property, who are styled the defendants; state the public use for which the property is required and give a concise statement of the facts showing the necessity for its acquisition for such use; aver that the plaintiff has been unable to agree with the owner of the property for its purchase and the reason of such inability; that it is the intention of the plaintiff, in good faith, to complete the work or improvement for which the property is to be taken, and that the preliminary steps required by law have been taken to entitle him to institute the proceedings, and demand that it be adjudged, that the public use requires the property to be so taken, that the plaintiff is entitled to so take it upon making compensation therefor, and that commissioners be appointed to appraise and ascertain the amount of such compensation to be paid. There must be annexed to the petition a notice stating the time and place at which the petition will be presented to a Special Term of the Supreme Court held in the judicial district where the property or some portion of it is situated. At least eight days before its presentation to the court, a copy of the petition and notice must be served upon each of the defendants, in the same manner in which a summons is required by the Code to be served. At the time of making such service, or at any time thereafter and before entry of the final order in the proceeding, the plaintiff may file in the office of the clerk of each county where any part of the property is situated a notice of the pendency of the proceeding, giving the names of the parties, the object of the proceeding, and a description of the property; and, after this is properly recorded and indexed, it is notice of the proceeding to all subsequent purchasers and

¹ Stim. Amer. Stat. L. §§ 1142-1149; Lewis, Eminent Domain, §§ 489-493, 584-587.

Highways and roads belonging to the public at large, when they are not dedicated nor gained by grant or public prescription, are an outcome of the exercise of the right of eminent domain by or in connection with public officials such as highway commissioners, overseers of highways, street or

encumbrancers of the property. The defendants may appear and answer, in the same manner as in an action in the Supreme Court, incapacitated parties appearing by their guardians existing or to be appointed by the court. An answer must be verified; and it may deny any of the allegations of the petition, or set up new matter constituting a defence. When an answer is interposed and issues are thus raised, they may be tried either by the court or by a referee; and the decision or report must be filed or handed to the attorney for the successful party within twenty days after the final submission of the case. If the decision or report be in favor of the defendants, the proceeding is to be dismissed. When it is in favor of the plaintiff, or when there has been no trial, judgment is to be entered, adjudging that the property is to be taken for the public purpose specified, and that the plaintiff is entitled to take it for that purpose upon making just compensation. After such judgment is entered, the court must appoint three commissioners to take evidence and fix the amount of compensation. If a trial has been had, this appointment is made after eight days' notice to all the defendants who have appeared. The commissioners must give eight days' notice of their meetings, except when they meet pursuant to order of the court or an adjournment. They must view the property and examine such witnesses as the parties desire, decide upon the amount of compensation to be made, and report to the court. They are not to make any deductions because of increase in value of other property caused by the improvement. Upon the filing of their report, either party may move, upon notice to the others, for its confirmation; and, if it be confirmed, a final order is entered directing that compensation shall be made accordingly, and that the plaintiff shall be entitled to enter upon the property for the purposes specified. There are also provisions for a writ of assistance, if needed, to enable the plaintiff to obtain possession, for entry of judgment against him for the amount of the compensation fixed upon by the commissioners, for new appraisals when deemed proper by the court, for appeals from the judgment or order, and for the taxing of the costs of the proceeding. See *Matter of Rochester Water Comm'rs*, 60 N. Y. 413; *Matter of Marsh*, 71 N. Y. 315; *Matter of N. Y. Cable Co.*, 104 N. Y. 1, 43; *Re Staten Is. R. T. Co.*, 103 N. Y. 251; *Stuart v. Palmer*, 74 N. Y. 183; *Matter of Brooklyn, etc. R. Co.*, 72 N. Y. 245; *Matter of 34th St. R. Co.*, 102 N. Y. 343; *Colonial City Traction Co. v. Kingston City R. Co.*, 153 N. Y. 540; *Henderson v. N. Y. C. R. Co.*, 78 N. Y. 423; *Matter of Mayor, etc. of N. Y.*, 99 N. Y. 570; *Matter of C. & R. R. Co.*, 67 N. Y. 242; *Matter of St. L. & A. R. Co.*, 133 N. Y. 271; *West Cemetery v. P. P. & C. R. Co.*, 68 N. Y. 591; *Matter of Trustees N. Y. & B'klyn Bridge*, 137 N. Y. 95; *Long Is. R. Co. v. Garvey*, 159 N. Y. 334; *People v. Adirondack Park Ass'n*, 160 N. Y. 225; *Matter of City of B'klyn*, 148 N. Y. 107; *Railroad Co. v. Robinson*, 133 N. Y. 271; *People ex rel. Stewart v. R. Comm'rs*, 160 N. Y. 202.

park boards, etc., the names being different in the different states. Under the statutory provisions enacted for this purpose, application is usually required to be made to a court for the appointment of commissioners to ascertain whether or not the proposed way is necessary and to assess the damages to be paid to the persons interested in the lands over which they may decide that it should pass. After the confirmation by the court of their report or decision in favor of the road, it becomes the duty of the highway officials of the town or locality to lay out and open the way accordingly.¹(a) The

(a) When public streets, highways, or other public places are to be laid out and opened in a city or village of New York, a particular mode of procedure is usually outlined, either in the charter of the city or village, or in some special law enacted for that locality. A sample of such special legislation is found in the provisions of the charter of the City of New York, relative to streets and parks. N. Y. L. 1897, ch. 378, §§ 970-1011. And for closing such streets, see L. 1895, ch. 1006. It is provided by the N. Y. Constitution, Art. III. § 18, that, "The legislature shall not pass a private or local bill . . . laying out, opening, altering, working, or discontinuing roads, highways, or alleys, or for draining swamps or other low lands." But it is held that this is not applicable to city streets or avenues. *Matter of Woolsey*, 95 N. Y. 135. Outside of such local enactments, the making of streets is controlled by the general provisions of the Highway Law (N. Y. Gen. L. ch. 19, Art. IV. being L. 1890, ch. 568, §§ 80-105), which are in substance as follows:—

Any person or corporation assessable for highway labor may make written application to the commissioners of highways of the town in which he or it resides or is assessable, to alter or discontinue a highway or to lay out a new one. Within thirty days thereafter, upon five days' notice to the commissioners of highways and such notice to interested parties as the county court shall order, he or it must apply, by verified petition, to the County Court for the appointment of commissioners to determine upon the necessity of the work proposed and assess the damages which will result. Thereupon the court appoints as such commissioners three disinterested freeholders, who must not be named by any person interested in the proceedings and who must be residents of the county, but not of the town, where the highway is or is to be located. They take the constitutional oath of office and fix upon a time and place at which they shall meet to hear the highway commissioners of the town where the highway is or is to be located and other interested parties. The applicant must cause at least eight days' previous notice of such meeting to be posted in at least three conspicuous places in the town, and also served upon the interested parties, or mail it to them if they do not reside in the same town or service can not be made upon them there. The commissioners appointed by the court examine the highway or property and, at their meeting (which they may adjourn from time to time), receive such evidence and reasons as may

¹ 1 Stim. Amer. Stat. L. §§ 1140-1149; *Lewis, Eminent Domain*, §§ 173, 176, 489-493.

street rights and burdens above discussed, such as those imposed by railways, telegraph and telephone poles and wires, gas or electric light appliances, etc., are simply additional servitudes placed upon streets and highways and more or less affecting as such servitudes the rights and interests of the proprietors of adjoining lands.¹

In a few states, including New York, Pennsylvania, Iowa, and Missouri, *private* roads, when necessary, may be created and laid out by operation of law.² Where the right to do this exists, it must be derived from a specific constitutional provision; for, since the proceeding consists in the seizure of the property of one private individual for the benefit of another, it is contrary to the fundamental law of the land, except in so far as that law has been directly modified by the people of any state.³ The proceedings for the laying out of such a way are ordinarily required to be before a jury of freeholders of the town, by whom the questions as to the necessity for the road and the compensation to be paid for it are determined. It is generally provided that the compensation, as thus fixed, shall be paid to the owner or owners of the land over which

be adduced, and, having made a decision and assessed the damages, if any, file one copy of the decision in the office of the town clerk and another in that of the county clerk. Within thirty days after their decision is filed with the town clerk, any party interested may apply to the county court for an order confirming, vacating, or modifying such decision. The proceedings thereon are the same as an ordinary, special proceeding before the court. If no such application be made within the thirty days, the decision of the commissioners becomes final. The decision, when it becomes thus final or confirmed, must be carried out by the commissioners of highways of the town, the same as if they had made an order to that effect. The statute contains, also, minute provisions as to laying out roads which may interfere with orchards, gardens, burying-grounds, etc., the making of highways through two or more towns and along division lines, new hearings when necessary and the costs of the proceedings.

The order of the County Court or judge confirming the report of the commissioners is not appealable, *Matter of De Camp*, 77 Hun, 478; nor will *certiorari* lie to review the decision of the commissioners, *N. Y. Code Civ. Pro.* § 2122; *Hanford v. Thayer*, 88 Hun, 136. See *N. Y. Const.* art. 1, § 7; *Gerard on Titles to R. E.* ch. ii.

¹ See § 179, *supra*.

² *N. Y. Const.* art. 1, § 7; *Gen. L.* ch. 19, §§ 106-123; *Palmer's Private Road*, 16 Pa. Co. Ct. 340; *Belk v. Hamilton*, 130 Mo. 292; *Taraldson v. Lime Springs*, 92 Iowa, 187.

³ *Ibid.*; *Logan v. Stogdale*, 123 Ind. 372; *Blackman v. Halves*, 72 Ind. 515; *Wild v. Deig*, 43 Ind. 455; *Stewart v. Hartman*, 46 Ind. 331.

the private road is to exist before it can be actually laid out and used.¹(a)

(a) This New York provision for laying out private roads by operation of law, substantially in its present form, was enacted by L. 1848, ch. 71; and see provisions affecting it in L. 1853, ch. 174; L. 1859, ch. 373; L. 1860, ch. 468. It is now found in §§ 106-123 of the highway law (L. 1890, ch. 568, being Gen. L. ch. 19), which rest upon the following constitutional provision (Const. art. 1, § 7): "Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited."

The sections of the highway law above cited provide in substance as follows: The proceedings begin with a written application to the commissioners of highways of the town in which the road is proposed to be located, specifying its width and location, courses and distances, and the names of the owners and occupants of the land through which it is sought to have it laid out. One or more of the commissioners then appoints a day, as early as the convenience of the parties interested will allow, when, at a place designated in the town, a jury will be selected to decide upon the necessity of such road and assess any resulting damages. The commissioners deliver to the applicant a copy of his application, to which is attached a notice addressed to the owners and occupants of the land, stating when and where the jury is to be selected. The applicant, on the same day or the next day (excluding Sundays and holidays), must serve copies of these on the owners or occupants, or mail them to them if they do not reside in the town or can not be served there. At the time and place thus fixed a jury is selected, and the time and place determined at which they are to meet and hear evidence and arguments. The jury view the premises, and, at their meeting so determined upon, hear the allegations of the parties and examine such witnesses and other evidence as may be produced, and, if they determine that the proposed road is necessary, assess the damages to the person or persons through whose land it is to pass, and deliver their verdict in writing to the commissioners of highways. The commissioners annex to such verdict the application and their certificate that the road is laid out, and the same are filed and recorded in the town clerk's office. Within thirty days thereafter, any owner of the land may apply to the County Court for an order confirming, vacating, or modifying the verdict, and the proceedings thereon are ordinary special proceedings. If no such application be made, the verdict is deemed final. Before the road is opened, the damages assessed by the jury must be paid by the applicant; but if the jury certify that the private road was made necessary by the alteration or discontinuance of a public highway, the damages are to be refunded to the applicant by the town. See *Satterly v. Winne*, 101 N. Y. 218; *Matter of De Camp*, 79 Hun, 478; *Hunford v. Thayer*, 88 Hun, 136; *Matter of Carpenter*, 11 Misc. 690; *Beveridge v. Schultz*, 32 Misc. 444; 2 L. R. (1813) 276; note 2, p. 229, *supra*.

¹ Last two preceding notes.

A state may declare streams and other bodies of water that are not navigable to be public highways; and this is frequently done by statute.¹ Such streams or waters thus become burdened with servitudes created by operation of law. So, in large cities, rights, privileges, and burdens in connection with partition walls and other structures, methods of building and supporting houses, regulations as to drains, etc., are more or less determined by statutes; and servitudes are thus brought into existence by operation of law.² Some of the most important of these rights and burdens are more fully examined hereafter in the discussion of particular classes of easements and servitudes.³

f. *Servitudes existing by Nature.*

§ 181. **Natural Servitudes — Kinds.** — The maxim *sic utere tuo ut alienum non lædas* has its most important illustrations in the operation of those natural rights and burdens which are attached in some degree to all corporeal hereditaments, and which must be here mentioned in order to complete our examination of the methods of acquiring easements and servitudes. Such privileges and obligations as nature establishes over lands are servitudes, but not common-law easements.⁴ They are always strongly appurtenant to the land; and adhere to and pass with it in its transfer, unless they are prevented from doing so by some positive law or agreement of the parties. Examples of them are found in the servitudes of lateral and subjacent support, which are the rights of a landowner to have his soil supported in its natural condition by that of the other proprietors of lands adjoining his own on the sides of it, and beneath it if any;⁵ in proper means of access from riparian

¹ *Shively v. Bowlby*, 152 U. S. 1; *Water Power Co. v. Water Comm'rs*, 168 U. S. 349; *Hardin v. Shedd*, 190 U. S. 508; *Smith v. City of Rochester*, 92 N. Y. 463, 473; *Lincoln v. Davis*, 53 Mich. 375; *Ensminger v. The People*, 47 Ill. 384. The word "highway," as used in a grant, does not mean a waterway of any kind, unless such is clearly shown to be the intent of the parties. *De Camp v. Dix*, 159 N. Y. 436.

² N. Y. L. 1892, ch. 275, § 9; N. Y. L. 1888, ch. 533, § 59; N. Y. L. 1897, ch. 378, §§ 1608-1620; *Atty.-Gen. v. Wil-*

liams, 178 Mass. 330; *Jones, Ease.* §§ 586, 634-640.

³ Ch. XII., *infra*.

⁴ *Stokes v. Singers*, 8 E. & B. 31, 36; *McGuire v. Grant*, 25 N. J. L. 356; 2 Fournel, *Traité de Voisinage*, 400; § 165, *supra*, and note.

⁵ *Angus v. Dalton*, L. R. 6 App. Cas. 740; *Lasala v. Holbrook*, 4 Paige (N. Y.), 169; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Gilmore v. Driscoll*, 122 Mass. 199; *White v. Dresser*, 135 Mass. 150; *McGettigan v. Potts*, 149 Pa. St. 155; *McGuire v. Grant*, 25 N. J. L. 356.

lands to natural bodies of navigable waters;¹ in the reciprocal privileges and burdens of owners of lands along the banks of natural streams whether on the surface or underground, such as the right and obligation to have the waters thereof flow over their accustomed bed unpolluted and substantially undiminished;² and in the rights to use, ward off, or intercept surface waters flowing in undefined courses,³ or percolating underground water, oil, or natural gas.⁴

Each of these forms of natural servitudes has given rise to many important questions and some conflict of opinion. A separate and somewhat detailed discussion of each of them is therefore required, and will be given in the following chapters, and so no further examination of them here is needed.⁵

¹ *Rumsey v. N. Y. & N. E. R. Co.*, 133 N. Y. 79; *N. Y. C. & H. R. R. Co. v. Aldridge*, 135 N. Y. 83; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387; *Shively v. Bowlby*, 152 U. S. 1; *Stevens v. Patterson & N. R. Co.*, 34 N. J. L. 532; *Hedges v. West Shore R. Co.*, 150 N. Y. 150.

² *Brown v. Bowen*, 30 N. Y. 519; *Scriven v. Smith*, 100 N. Y. 471; *Acquackanonck Water Co. v. Watson*, 29 N. J. Eq. 366; *Shively v. Bowlby*, 152 U. S. 1; *Merrifield v. Worcester*, 110 Mass. 216; *Druley v. Adam*, 102 Ill. 177; *Lord v. Meadville Water Co.*, 135 Pa. St. 122.

³ *Barkley v. Wilcox*, 86 N. Y. 140; *Peck v. Goodberlett*, 109 N. Y. 180; *Bowlsby v. Speer*, 31 N. J. L. 351; *Cassidy v. Old Colony R. Co.*, 141 Mass. 174; *Murphy v. Kelley*, 68 Me. 521; *Wakefield v. Newell*, 12 R. I. 75; *Preston v. Hall*, 77 Iowa, 309.

⁴ *Acton v. Blundell*, 12 M. & W. 324; *Bradford v. Pickles* (1895), App. Cas. 587; *Bloodgood v. Ayers*, 108 N. Y. 400; *Davis v. Spaulding*, 157 Mass. 431; *People's Gas Co. v. Tyne*, 131 Ind. 277, 408; *Westmoreland Gas Co. v. De Witt*, 130 Pa. St. 235; *McKee v. Del. & H. Canal Co.*, 125 N. Y. 353; *Walker v. So. Pac. R. Co.*, 165 U. S. 593.

⁵ See §§ 206-210, 220-225, *infra*.

CHAPTER XI.

INCIDENTS OF EASEMENTS AND SERVITUDES — THEIR TERMINATION AND SUSPENSION — REMEDIES.

§ 182. Topics of this chapter.

a. *Incidents of Easements and Servitudes.*

§ 183. Transfer of them.

§ 184. Use and enjoyment of them.

§ 185. Repairs of them.

§ 186. Alterations of them.

b. *Termination, Destruction, and Suspension of Easements and Servitudes.*

§ 187. Natural termination.

§ 188. Methods of destroying and suspending them.

§ 189. (a) Release.

§ 190. (b) Disclaimer, or abandonment and estoppel.

§ 191. (c) Non-user.

§ 192. (d) Adverse obstruction, or prescription.

§ 193. (e) Destruction of that on which the right depends.

§ 194. (f) Union of tenements.

§ 195. (g) Excessive claim or user.

§ 196. Remedies for obstructions or injuries to easements and servitudes.

§ 182. **Topics of this Chapter.** — The acquisition and general nature of common-law easements and those of servitudes which are not easements have been separately discussed in the last two preceding chapters. In regard to their important incidents, such as their transfer, use, repairs, and alterations, all of these rights may now be most conveniently and intelligibly examined together. Those incidents, the methods by which easements and servitudes may be terminated or suspended and the remedies for their obstruction or injury are the topics of this chapter. Some special features of particular, important species of these incorporeal hereditaments will be separately examined in the next succeeding chapter.

a. *Incidents of Easements and Servitudes, including their Transfer, Use, Repairs, and Alterations.*

§ 183. **Transfer of Easements and Servitudes.** — The prevailing rule as to easements in gross, in both England and

America, is that they are not assignable nor inheritable, and can not be made so by any form of words in the deeds or contracts by which they are brought into being. They are attached to the persons to whom they are granted, and can not exist in any other way.¹ So, the other forms of servitudes above discussed, which do not require the existence of any dominant estate, such, for example, as the rights of the public in a street or highway, are commonly of such a character that they must remain the property of the town, parish, or other political body which acquired them, or must cease to exist.² In a few of the United States, however, such as Massachusetts and Wisconsin, it is held that easements in gross may be so created as to be readily passed from hand to hand in the same ways in which other species of real property are transferred.³ And there are some forms of the other servitudes having no dominant tenements, such as rights of way acquired by railroad or turnpike companies, of which valid transfers may unquestionably be made so long as the purposes and ends to which they are applied are not materially changed.⁴ These rights and privileges over land which belong to individuals or corporations as such, and are not appurtenant to other land, may be said, in summary, to be ordinarily independent, proper objects of such agreements, assignments, and transfers as the interested parties choose to make; with the two qualifications, however, that the public interests shall not be injuriously affected by such conveyances or agreements, and

¹ *Ackroyd v. Smith*, 10 C. B. 164; *Louisville & N. R. Co. v. Koelle*, 104 Ill. 455; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; *Pearson v. Hartman*, 100 Pa. St. 84; *Cadwalader v. Bailey*, 17 R. I. 495; *Wagner v. Hanna*, 38 Cal. 111; *Boatman v. Lasley*, 23 Ohio St. 614; *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 432; *Hall v. Armstrong*, 53 Conn. 554; *Hoosier Stone Co. v. Malott*, 130 Ind. 21, 24; *Fisher v. Fair*, 34 S. C. 203; *Wilder v. Wheeler*, 60 N. H. 351; *Wash. Ease.* (4th ed.) p. 13, p. *9.

² *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 432. A servitude conveyed to a city, "its successors and assigns," has been held to be capable of being assigned, however; and it seems to be clear that, if the parties use such express words to that effect, they may thus make these

rights, not strictly servitudes in fee since a fee must be appurtenant to land, but contract rights in perpetuity which may be legally transferred from hand to hand. See also *Wilder v. Wheeler*, 60 N. H. 351.

³ The intention that the right shall be enjoyed by the grantee, his heirs and assigns, must be clearly manifested. *Bowen v. Conner*, 6 Cush. (Mass.) 132; *French v. Morris*, 101 Mass. 68; *Owen v. Field*, 102 Mass. 90; *Hankey v. Clark*, 110 Mass. 262; *Poull v. Mockley*, 33 Wis. 482.

⁴ This occurs, for example, when a railroad franchise and all its ways, rights, and privileges are sold or leased. See *Eastman v. Anderson*, 119 Mass. 526; *Barney v. Keokuk*, 94 U. S. 324, 340; 12 Amer. & Eng. Ency. of L. 660.

that, in most jurisdictions, mere easements in gross are of a purely personal character and are not capable of passing from hand to hand.¹

On the other hand, an easement or servitude which is appurtenant to a dominant tenement adheres to that tenement and passes with it in its transfer by descent, devise, or act *inter vivos*.² It is not even necessary that the right or privilege shall be mentioned in the deed of the land to which it is appurtenant; though in practice the statement that the instrument is meant to convey the lot particularly described, with all its appurtenances, is the form of the express contract by which such incorporeal hereditaments are ordinarily granted.³ An appurtenant easement, moreover, can not be conveyed by its owner separate from the land. It can not be converted into an easement or right in gross. It inheres in the corporeal, dominant property, and can not exist in any other form.⁴ In order that it shall be thus appurtenant and adhere thus closely to the land, passing with it and not being severable from it, the easement must be of some benefit to the corporeal property, a valuable adjunct to it, appropriate and reasonably

¹ The distinction must be again carefully noted between an easement and a *profit à prendre*. The latter means the right to take something from the servient estate, while the former never involves that right. While an easement in gross is ordinarily of a purely personal character and not assignable nor transferable in any way, a *profit à prendre*, even though it be the property of an individual as such and without any reference to his ownership of any dominant tenement, may be readily made assignable and inheritable by the use of apt words in the deed or contract by which it is created. *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 39; *Buffum v. Harris*, 5 R. I. 243; *Stevenson v. Wiggin*, 56 N. H. 308; *Wash. Ease*. (4th ed.) p. 13, p. *9. And see *Pierce v. Keator*, 70 N. Y. 419.

² *Staple v. Heydon*, 6 Mod. 1; *United States v. Appleton*, 1 Sumn. (U. S. Cir. Ct.) 492, 503; *Newman v. Nellis*, 97 N. Y. 285; *Cady v. Springfield Water Works Co.*, 10 N. Y. Supp. 570; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447;

Manderback v. Orphans' Home, 109 Pa. St. 231; *Jones v. Adams*, 162 Mass. 224; *Brakely v. Sharp*, 9 N. J. Eq. 9; *Chicago, St. F. & C. R. Co. v. Ward*, 128 Ill. 349; *Parish v. Kaspere*, 109 Ind. 586; *Cole v. Bradbury*, 86 Me. 380; *Cadwalader v. Bailey*, 17 R. I. 495; *Shields v. Titus*, 46 Ohio St. 528; *Coolidge v. Hagar*, 43 Vt. 9.

³ *United States v. Appleton*, 1 Sumn. (U. S. Cir. Ct.) 492, 502; *Spencer v. Kilmer*, 151 N. Y. 390, 399; *Newman v. Nellis*, 97 N. Y. 285; *Dority v. Dunning*, 78 Me. 381; *Alexander v. Tolleston Club*, 110 Ill. 65; *Kent v. Waite*, 10 Pick. (Mass.) 138; *Shields v. Titus*, 46 Ohio St. 528.

⁴ *Hankey v. Clark*, 110 Mass. 262; *Cadwalader v. Bailev*, 17 R. I. 495; *Moore v. Crose*, 43 Ind. 30; *Ackroyd v. Smith*, 10 C. B. 164; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; *Boatman v. Lasley*, 23 Ohio St. 614; *Newman v. Nellis*, 97 N. Y. 285. By express words an easement may be made appurtenant to any certain portion of the land. *Leach v. Hastings*, 147 Mass. 515.

requisite to its enjoyment for the purposes for which it is conveyed.¹ But there need be no absolute necessity that the easement shall exist in order that the land may be properly enjoyed. Thus, if the owner of a lot of land fronting on a public highway purchase the adjoining lot in the rear, access to which has uniformly been over a private way (not a way of necessity) from another public street, the fact that he may now reach both parcels from the one highway which one of them adjoins will not interfere with his acquisition of the private way as appurtenant to his newly acquired property.² An easement or servitude that is appurtenant to a piece of land adheres to every part of it; and when the land is divided and parcelled out among a number of different owners, either by act of the parties or by operation of law, each of them may enjoy the right, so long as this does not result in unduly increasing the burden on the servient tenement.³

§ 184. **Use and Enjoyment of Easements and Servitudes.** — The ways in which easements or servitudes may be used and the extent to which their enjoyment may be carried are to be determined, from a fair construction of the deed or instrument by which they are granted or reserved when they are the result of agreement by the parties, from the method of user by which they have been acquired when they arise from prescription or custom, from an ascertainment of the purposes for which the rights were originally contemplated or for which they are appropriate and useful for public enjoyment when they are created by operation of law, and from their requirement for the protection or reasonable employment of the land when they exist by nature.

When a right of way is expressly granted for a footpath, the grantee can not use it for a carriage road or horseway.⁴ And where the lessor of a parcel of land reserved over it a way to and from a stable which belonged to him, "on foot, and for horses, oxen, cattle, and sheep," it was held that this did not give him the right to carry manure in a wheelbarrow

¹ *Ackroyd v. Smith*, 10 C. B. 164; *Bailey v. Stephens*, 12 C. B. n. s. 91; *Borst v. Empire*, 5 N. Y. 33; *Pierce v. Kentor*, 70 N. Y. 419; *Dennis v. Wilson*, 107 Mass. 591; *Boland v. St. John's Schools*, 163 Mass. 229; *Lathrop v. Elsner* 93 Mich. 599; *Knecken v. Voltz*, 110 Ill. 264; *Snensley v. Valentine*, 34 Wis. 154; *Dooly v. Dunning*, 78 Me. 381.

² *Fritz v. Tompkins*, 39 N. Y. App. Div. 73; *Parsons v. Johnson*, 68 N. Y. 62; *Mussey v. Union Wharf*, 41 Me. 34.

³ *Philbrick v. Ewing*, 97 Mass. 133; *Spaulding v. Abbot*, 55 N. H. 423.

⁴ *Kirkham v. Sharp*, 1 Whart. (Pa.) 323.

from the stable across the land.¹ So, if there be granted or reserved to A the privilege of passing over B's land simply to reach lot No. 1, A will be a trespasser if he use the road to reach lot No. 2, even though he may pass over the way to lot No. 1 in the first place and thence across the latter to lot No. 2.² "The grantee of a way is limited to use his way for the purposes and in the manner specified in his grant. He can not go out of his way, nor use it to go to any other place than that described, nor to that place for any other purpose than that specified, if the use in this respect is restricted."³ Whatever is necessary, however, to the reasonable enjoyment of the easement passes with it;⁴ and when the grant or reservation is made generally without any particular specification of the place or method of its use, it may be enjoyed to such an extent and in such a reasonable manner as does not unnecessarily burden the servient tenement.⁵ Accordingly, when the right is a footpath, it must be high and wide and light enough for the convenient passing of persons and such things as they usually carry.⁶ When it is a "wagon road," it may be employed for the transportation of any reasonable loads on wagons of any ordinary form and size.⁷ And where it was a right of way to a warehouse, it included, as an incident to its proper enjoyment, the right of the tenant of the warehouse to pile goods upon the land and keep them there for a reasonable length of time, in the process of moving them to and from the building.⁸

¹ *Brunton v. Hall*, 1 Q. B. 792; *Furner v. Seabury*, 135 N. Y. 50.

² *Davenport v. Lamson*, 21 Pick. (Mass.) 72; *Crocker v. Cotting*, 181 Mass. 146; *Howell v. King*, 1 Mod. 190; *Colchester v. Roberts*, 4 M. & W. 769; *Lawton v. Ward*, 1 Ld. Raym. 75; 1 Rolle Abr. 391, pl. 3; § 147, *supra*.

³ *French v. Marstin*, 24 N. H. 440, 32 N. H. 316; *Regina v. Pratt*, 4 E. & B. 860; *Colchester v. Roberts*, 4 M. & W. 769, 774; *Greene v. Canny*, 137 Mass. 64, 69; *Woolrych on Ways*, p. * 34.

⁴ *Baker v. Frick*, 45 Md. 337; *Baldwin v. Boston & M. R. Co.*, 181 Mass. 166; *Arnold v. Fee*, 148 N. Y. 214; *Gillespie v. Weinberg*, 148 N. Y. 238.

⁵ *Abbott v. Butler*, 59 N. H. 317; *Bakeman v. Talbot*, 31 N. Y. 366;

George v. Cox, 114 Mass. 382, 388; *Parks v. Bishop*, 120 Mass. 340; *Atty.-Gen. v. Williams*, 140 Mass. 329.

⁶ *Atkins v. Bordman*, 2 Met. (Mass.) 457; *Tucker v. Howard*, 128 Mass. 361; *Gerrish v. Shattuck*, 132 Mass. 235.

⁷ *Atkins v. Bordman*, 2 Met. (Mass.) 457; *Richardson v. Pond*, 15 Gray (Mass.), 387, 389; *Bakeman v. Talbot*, 31 N. Y. 366.

⁸ *Appleton v. Fullerton*, 1 Gray (Mass.), 186; *Lyman v. Arnold*, 5 Mason, 195, 198; *Sargent v. Hubbard*, 102 Mass. 380. It is ordinarily a question of fact for the jury as to what things are reasonably necessary or convenient, so as to be included within that which the owner of the easement or servitude may enjoy; but the jury is to act under the instructions of the

A right or privilege acquired by prescription must result from a user of the servient estate in the same place and within definite boundaries during the entire period of limitation.¹ The manner and extent of such user then determine the character and limitations of the easement or servitude thus acquired. It can "never outrun or exceed the user in which it had its origin."² Thus, when a railroad company has acquired a right of way by prescription, it is limited to the enjoyment thereof to the width which it has employed during the period of adverse user.³ So, where the prescriptive roadway is obtained solely for agricultural purposes, and the dominant property subsequently becomes a manufacturing or residential district, the right can not be enjoyed for these new purposes so as to impose a heavier burden upon the servient tenement.⁴ But a fair and reasonable employment of the right gained by prescription will be upheld by the courts; and the owner of the dominant estate will not be restricted in its enjoyment unless his acts substantially change or increase the burden on the other's land. It was accordingly held that the mere fact that the owner of a so-called "nine-acre field," who had acquired by adverse user a general right of way from it to a highway, carried over the road a quantity of hay, of which a small portion had been raised on an adjoining field, did not constitute an excessive use of the easement.⁵

It may be repeated that the uses to which a way of necessity may be applied are determined by its requirements for the reasonable enjoyment of the dominant estate for the purposes contemplated by the parties to the conveyance, and that

court as to the classes and character of the incidental privileges which they may include. *Baker v. Frick*, 45 Md. 337; *Atkinson v. Bordman*, 2 Met. (Mass.) 457; *Richardson v. Pond*, 15 Gray (Mass.), 389.

¹ *Jones v. Percival*, 5 Pick. (Mass.) 485; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489; *Kurtz v. Hoke*, 172 Pa. St. 165; § 157, *supra*.

² *Amer. Bank Note Co. v. N. Y. El. R. Co.*, 129 N. Y. 252, 266; *Lewis v. N. Y. & H. R. Co.*, 40 N. Y. App. Div. 343; *Ryan v. M. V. & S. I. R. Co.*, 62 Miss. 162; *Richardson v. Pond*, 15 Gray (Mass.), 387.

³ *O. & R. V. R. Co. v. Rickards*, 38 Neb. 847.

⁴ *Parks v. Bishop*, 120 Mass. 340; *Wimbledon & Putney Commons Conservators v. Dixon*, L. R. 1 Ch. Div. 62.

⁵ *Williams v. James*, 2 C. P. 577; *Parks v. Bishop*, 120 Mass. 340; *Atwater v. Bodfish*, 11 Gray (Mass.), 150; *Cowling v. Higginson*, 4 M. & W. 245. It is to be noted that the owner had acquired a *general* way in these cases. When by grant or fair implication a right is obtained for only one lot, it can not, as shown above in this section, be used for other land. See also § 147, *supra*, especially *French v. Marstin*, 32 N. H. 316; *Crocker v. Cotting*, 181 Mass. 146.

the way ceases when the necessity terminates.¹ Rights which exist in the natural order of things, such as the right to the lateral support of soil, or that to the usual flow of a natural stream, are servitudes which may be enjoyed and must be endured to the extent which the ordinary uses of the land in its natural condition requires, but do not ordinarily extend to the benefit of artificial erections or improvements. A right, for example, to have one's soil laterally supported by that of his neighbor does not exist naturally in favor of buildings, nor does it include any soil or its products in other than their natural condition.² The waters of a natural stream may be used by the owner of the land over which it flows, in any manner and to any extent that he may desire, so long as he does not change the place at which they pass into his neighbor's property, nor pollute them, nor substantially diminish their volume.³

The owner of the servient estate may employ his land for such purposes as he pleases, consistent with the reasonable and proper use of the easement or servitude.⁴ If, for example, the right be a private way, the servient owner may, as a general rule, maintain a gate or bars across it, provided that this is not contrary to the contract of the parties and does not materially interfere with the use of the way.⁵ But he must not so place obstructions in the way, nor so remove or destroy the accessories to its use, as to restrict essentially the reasonable enjoyment of the right. Therefore, where the easement consisted of a carriage road, the proprietor of the land over which it existed was enjoined from depositing stones in the way, and from hauling heavy loads over it in

¹ §§ 145, 147, *supra*.

² *Angus v. Dalton*, L. R. 6 App. Cas. 740; *White v. Dresser*, 135 Mass. 150; *White v. Nassau Trust Co.*, 168 N. Y. 149, 155; §§ 207, 208, *infra*.

³ *Brewster v. Rogers Co.*, 169 N. Y. 73; § 222, *infra*.

⁴ *Bakeman v. Talbot*, 31 N. Y. 366, 371.

⁵ *Huson v. Young*, 4 Lans. (N. Y.) 63; *Bean v. Coleman*, 44 N. H. 539; *Houpes v. Alderson*, 22 Iowa, 160, 163; *Connery v. Brooks*, 73 Pa. St. 80; *Atkins v. Bordman*, 2 Met. (Mass.) 457; *Richardson v. Pond*, 15 Gray (Mass.), 387, 389. In one case, where the right of way was granted over a space twenty

feet wide, it was held that the servient tenant might place obstructions within that space, so long as he did not shut out a convenient way. *Johnson v. Kinnicut*, 2 Cush. (Mass.) 153, 156. But the express grant or reservation of a well-defined width entitles the grantee to the entire space unobstructed. *Tucker v. Howard*, 122 Mass. 529, 128 Mass. 361; *Nash v. N. E. Ins. Co.*, 127 Mass. 91; *Bissell v. Grant*, 35 Conn. 288, 295. So, the landowner may cultivate the soil, over which the road exists, in such a manner as not to interfere with the use of the privilege according to the terms of the grant or reservation. *Wells v. Tolman*, 156 N. Y. 636.

such a manner as to cut it up and make it unsuitable for light carriages.¹

In a word, the owner of the easement or servitude shall have the right to use it and all things accessory to its enjoyment in the manner contemplated and implied in its original creation or existence; and the owner of the land shall have the enjoyment of his property in all methods not inconsistent with such use and enjoyment of the incorporeal right or privilege.

§ 185. **Repairs of Easements and Servitudes.** — The owner of the servient tenement *may* be bound, by grant, reservation, or prescription, to make such repairs as may be necessary to the proper enjoyment of the easement or servitude by its owner.² But, as a general rule, this obligation does not rest upon him; and the dominant tenant can insist on no repairs or improvements other than those which he himself makes or causes, even though they may be necessary to the enjoyment of his right.³ The authority, however, to amend, repair, or improve the property, to the extent which may be fairly requisite to the utility to its owner of the right or privilege as reasonably contemplated by the parties, goes with it as an incident to its ownership. Such incidental rights have been described as "secondary easements."⁴ Thus, the grant of a way includes the right of its owner to keep it in good condition for the purposes for which it was created. And the right to use a house or any part of it for a particular purpose carries with it the right to repair it to the extent which that purpose requires.⁵

While the owner of the dominant tenement has authority

¹ *Herman v. Roberts*, 119 N. Y. 37.

² *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, 330; *Middleford v. Church Mills Knitting Co.*, 160 Mass. 267; *Bronson v. Coffin*, 108 Mass. 175; *Lynn v. Turner*, Cowper, 86; *Kingston-upon-Hull v. Horner, Loft*, 576.

³ *Gerrard v. Cooke*, 5 B. & P. 109, 115; *Pomfret v. Ricroft*, 1 Saund. 321, 323, n. 3; *Rider v. Smith*, 3 T. R. 766; *Doane v. Badger*, 12 Mass. 65; *Joseph v. Ager*, 108 Cal. 517; *Hargrave v. Cook*, 108 Cal. 72.

⁴ *Nicholas v. Chamberlain*, Cro. Jac. 121; *Tooth v. Bryce*, 50 N. J. Eq. 589, 609.

⁵ *Benham v. Minor*, 38 Conn. 252;

Liford's Case, 11 Rep. 46 b, 52 a; *Wetmore v. Fisk*, 15 R. I. 354; *Herman v. Roberts*, 119 N. Y. 37; *Huntington v. Asher*, 96 N. Y. 604; *Edgett v. Douglas*, 144 Pa. St. 95. Nor do words in the deed of conveyance of a way, declaring that no easement shall pass by implication, nor long user of the way without actually making any repairs, deprive the owner of a way of the right to make repairs when necessary. "The very existence of a right of way precludes the idea that the party who has the right can not repair or keep the way in order." *McMillan v. Cronin*, 75 N. Y. 474, 477; *St. Anthony F. W. Co. v. Minneapolis*, 41 Minn. 270, 274.

to make such repairs as the proper uses of his right demand, yet, as between him and the servient tenant, he is under no obligation to repair, unless required to do so by contract or prescription.¹ He may let the way, drain, wall, or other subject of the right become useless if he please; and, except in cases in which this is a violation of his duty to the public or to his neighbor to keep his property in a safe condition, he is not answerable therefor to any one.²

The privilege of making necessary and reasonable repairs, includes, of course, the right to go upon and use the servient property to the requisite extent. The owner of a dam and right of flowage may enter upon the soil and take as much of it as is needed to keep the dam in good condition, doing as little injury as possible to the servient land; and he who has a right of way is entitled to have such use of the adjacent land as is required to make and keep a good road.³ But when the means of enjoying his right are out of repair, he must not pass over or appropriate other portions of the servient tenement, unless the owner of the latter is bound to repair, or has wilfully and wrongfully obstructed or interfered with the proper use of the easement or servitude. The owner of such a privilege can not, by his own act or neglect, let the means of utilizing it become defective, and, in consequence thereof, impose a heavier or different burden upon the servient property.⁴ If, however, the proprietor of the latter, by intentional wrong, impair the means of enjoying the right, the dominant owner may use the adjacent land as long as the unwarrantable interference continues.⁵

§ 186. **Alterations of Easements and Servitudes.** — The very existence of an easement or servitude, placing as it does the enjoyment of one man's land to some extent in the hands of another, calls for careful, exact, and quite stringent regula-

¹ Taylor v. Whitehead, Doug. 744; McMillan v. Cronin, 75 N. Y. 474; Jones v. Percival, 5 Pick. (Mass.) 485, 487; Walker v. Pierce, 38 Vt. 94

² Pomfret v. Ricroft, 1 Wms. Saund. 321; Duncan v. Louch, 6 Q. B. 904; Roberts v. Roberts, 55 N. Y. 275; Kaler v. Beaman, 49 Me. 207; Doane v. Badger, 12 Mass. 65.

³ Edgett v. Douglas, 144 Pa. St. 95; Gerrard v. Cooke, 5 B. & P. 109; Duncan v. Louch, 6 Q. B. 904; Huntington v. Ashor, 96 N. Y. 604; Herman v.

Roberts, 119 N. Y. 37; Doane v. Badger, 12 Mass. 65; Newcomen v. Coulson, L. R. 5 Ch. Div. 133; Senhouse v. Christian, 1 T. R. 560; Dand v. Kingscote, 6 M. & W. 174.

⁴ Rockland W. Co. v. Tillson, 75 Me. 170; Capers v. McKee, 1 Strobh. (S. C.) 164; McMillan v. Cronin, 75 N. Y. 474.

⁵ Taylor v. Whitehead, Doug. 744; Bullard v. Harrison, 4 M. & S. 387; Hamilton v. White, 5 N. Y. 9; Wash. Ease. (4th ed.) p. 293, p. *196.

tions of their reciprocal rights and duties. The property of each must be so used as not to cause any injury to the other, with which it is so intimately associated; yet the restrictions must ordinarily be no more severe than such as are required by this principal. "The right of the easement owner and the right of the landowner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both."¹

It is accordingly held that the owner of the right may make such improvements and alterations as do not substantially change its character.² But he may be enjoined from adding anything to it, or taking anything from it, or employing it in a manner or place, which may result in his enjoyment upon the servient land of something materially different from that to which he is strictly entitled; and this though the change or improvement might be of no immediate detriment to the servient estate, or might be to it in some sense a benefit.³ Thus, a slight alteration in a road, made by the owner of the right of way for the purpose of straightening it and rendering it more convenient to all parties, will be permitted.⁴ And a change in the method of using water as it runs over one's own land, whether the stream be natural or artificial, gives no right of action to his neighbors, provided it does not materially affect the character of the water nor the manner in which it flows over their lands.⁵ But an open drain can not be changed to a drain through a pipe, or *vice versa*, against the will of the owner of the land through which it passes.⁶ Nor will the proprietor of a mill run by water power be per-

¹ *Olcott v. Thompson*, 59 N. H. 154, 156.

² *Roberts v. Roberts*, 55 N. Y. 275.

³ *Luttrell's Case*, 4 Rep. 84 b; *Tapling v. Jones*, 11 H. L. Cas. 290; *Dickerson v. Grand Junction Canal Co.*, 15 Beav. 260; *Onthank v. L. S. & M. C. R. Co.*, 71 N. Y. 194; *Evangelical Lutheran St. J. & O. Home v. Buffalo Hydraulic Ass'n*, 64 N. Y. 561; *Merritt v. Parker*, 1 N. J. L. 460; *Johnston v. Hyde*, 32 N. J. Eq. 446; *Allen v. San Jose L. & W. Co.*, 92 Cal. 138; *Dewey v. Bellows*, 9 N. H. 282; *Darlington v. Painter*, 7 Pa. St. 473; *Jennison v. Walker*, 11 Gray (Mass.), 423. The owner of land has an arbitrary right to determine whether or not it shall be improved.

A benefit bestowed upon it against his will is a legal injury to him. *Ibid*.

⁴ *Lawton v. Rivers*, 2 M'Cord (S. C.), 445. And see *Burris v. People's Ditch Co.*, 104 Cal. 248; *Richardson v. Clements*, 89 Pa. St. 503; *Blaine v. Ray*, 61 Vt. 566.

⁵ *Luttrell's Case*, 4 Rep. 84 b; *Saunders v. Newman*, 1 Barn. & Ald. 258, 262; *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 454; *Blanchard v. Baker*, 8 Me. 253; *Buddington v. Bradley*, 10 Conn. 213.

⁶ *Allen v. San Jose L. & W. Co.*, 92 Cal. 138; *Dickerson v. Grand Junction Canal Co.*, 15 Beav. 260; *Jaqui v. Johnson*, 27 N. J. Eq. 526.

mitted to alter the machinery therein or its workings in such a manner as to interfere essentially with the operation of other mills below his own.¹

On the other hand, the owner of the servient tenement must do nothing to alter materially the servitude to which his land is subjected. Even though the act might result in an improvement of the easement or servitude and increase its usefulness to its owner, the latter may have an injunction against the working of any substantial change in his right or in the mode of its enjoyment.² Subject to this limitation, the servient tenant may work and improve his land and put it to any legal use which he may desire. The owner of an easement in the use of an aqueduct, for example, can not restrain the landowner from putting a more ornamental covering over the reservoir and otherwise improving his property, in such a manner as not to materially interfere with the enjoyment of the right.³ The owner of land over which a way of necessity is to exist may locate it in the first instance, if he make it reasonably convenient; but, after it is once fixed, he can not change it without the other's consent.⁴ In case, however, of the material alteration of any easement or servitude by the servient tenant, if it be used in its changed condition for so long a time as to show an acquiescence on the part of its owner, he can not thereafter have it restored to its original form without the consent of the servient owner.⁵

b. *Termination, Destruction, and Suspension of Easements and Servitudes.*

§ 187. **Natural Termination.** — Incorporeal rights and obligations, of course, may be so limited at the time of their creation that they can not perpetually endure, but must come to a natural end in the lapse of time. Thus, a grant to one of a right of way over his neighbor's field, "for and during his natural life," will terminate at the death of the grantee.

¹ *Wentworth v. Poor*, 38 Me. 243; *Cowell v. Thayer*, 5 Met. (Mass.) 253; *King v. Tiffany*, 9 Conn. 162.

² *Vinton v. Greene*, 158 Mass. 426; *Roberts v. Roberts*, 55 N. Y. 275; *Allen v. San Jose L. & W. Co.*, 92 Cal. 138;

Haslett v. Sheperd, 85 Mich. 165; *Kelley v. Saltmarsh*, 146 Mass. 585.

³ *Olcott v. Thompson*, 59 N. H. 154.

⁴ § 146, *supra*.

⁵ *Betts v. Badger*, 12 Johns. (N. Y.) 223; *Fitzpatrick v. B. & M. R. Co.*, 84 Me. 33.

So a privilege of using another's land may be expressly made to continue only for some definite period of time, as a stated number of years or months; or to last until some contingent event does or does not occur, or until some designated purpose shall be accomplished. In such cases, it is hardly necessary to say, the easement or servitude terminates naturally when the time for which it was made has elapsed, or the purposes of its creation have been fulfilled.¹

Aside from such natural ending, these rights and burdens, whether created for some temporary purpose or to continue perpetually, may be terminated or suspended in the various ways which are next to be investigated.

§ 188. **Methods of destroying and suspending Easements and Servitudes.** — The means of destroying, and sometimes suspending, these rights are by (a) release, (b) disclaimer, or abandonment and estoppel, (c) non-user, (d) adverse obstruction, or prescription, (e) destruction of that upon which the right depends, (f) union of the dominant and servient estates, and (g) excessive claim or user. In most instances, any of these methods of dealing with the incorporeal right destroys it altogether; but under some conditions, which will be hereafter explained, the easement or servitude is only suspended for a time, and revives when such operating cause of its cessation is removed. Each of these ways of terminating easements and servitudes, or causing them to cease to operate for a season, will be separately examined.

§ 189. (a) **Release of Easements and Servitudes.** — *Technical Release under Seal.* — Anything of an incorporeal nature may be terminated and destroyed by an express release under seal, from the owner of the right to the owner of the servient property.² It may also be temporarily suspended, to operate again in the future, or partly done away with, set aside, or altered in any manner agreed upon by the parties to the contract. So long as the rights of third persons are not interfered with, those who are interested in the land and the rights and burdens upon or over it may regulate or terminate the latter in any way that is clearly indicated by their deed. It has accordingly been held that an express release of a right of way ends it, although the effect is to cut off the releasor's

¹ Hahn v. Baker Lodge, 21 Oreg. 30;
Shirley v. Crabb, 138 Ind. 200; Thorn
v. Wilson, 110 Ind. 325.

² Dyer v. Sanford, 9 Met. (Mass.)
395; Comstock v. Sharp, 106 Mich.
176.

means of access to his land because it is entirely surrounded by land of the releasee and that of other persons.¹

Such express contracts, by which interests in real property are affected, are generally required by the statutes of frauds to be in writing; and, in order to be a common-law release, the writing must be under seal.

Release in Form of License. — Using the word "release" for a moment, however, in its broad, general sense, to denote a voluntary relinquishment of a thing in any manner, it may be stated as a well-established principle that by a mere license, which is a permission given orally or by a writing not under seal, the owner of an *easement* may effectually release it to the servient tenant. This is done by an authority to the owner of the servient land to do something upon it which will obstruct the enjoyment of the easement; as when he is expressly permitted to erect upon it a house or wall, in such a way as to shut out from the windows of his neighbor, the licensor, the light and air in the enjoyment of which the latter had in some manner acquired an adverse right.² While an easement can not be *created* by parol agreement; yet, when an oral license is thus given to do an act *on the land of the licensee*, and the effect thereof is to destroy or impair an easement appurtenant to land of the licensor, the latter will not be permitted to revoke the license so as to stop or interfere with any changes, additions, or improvements that have been begun or made upon the servient land in consequence of the authority so given.³ But a parol license to do an act *on the licensor's land* can not have such an operation. The licensor may revoke it at any time, and compel the licensee to restore the property to its original condition.⁴

Both of the rules of law above stated — that an easement may be destroyed by a license to do an act on the licensee's land, but that irrevocable privileges can not flow from a license to do an act on the licensor's land — are well illustrated by the decision in *Morse v. Copeland*.⁵ The plaintiff in that case

¹ *Richards v. Attleborough Branch R. Co.*, 153 Mass. 120.

² *Liggins v. Inge*, 7 Bing. 682; *Winter v. Brockwell*, 8 East, 308; *Elliott v. Rhett*, 5 Rich. (S. C.) 405, 418, 419; *Dyer v. Sanford*, 5 Met. (Mass.) 395.

³ *Winter v. Brockwell*, 8 East, 308; *Pope v. O'Hara*, 48 N. Y. 446; *Veghte v. Raritan Co.*, 19 N. J. Eq. 142, 153;

Ford v. New Haven & North Co., 23 Conn. 214, 223; § 243, *infra*.

⁴ *Liggins v. Inge*, 7 Bing. 682; *Dyer v. Sanford*, 9 Met. (Mass.) 395; *Crosdale v. Lanigan*, 129 N. Y. 604; *White v. Man. R. Co.*, 139 N. Y. 19; *Lawrence v. Springer*, 49 N. J. Eq. 289; §§ 240, 242, *infra*.

⁵ 2 Gray (Mass.), 302.

owned a right of flowage over land of the defendant. He gave to the latter oral permission to erect a dam upon that land, in such a position as to prevent the water from flowing over a part of it which had formerly been covered by the water; and also an oral license to dig and maintain a drain, from the land thus taken from the pond, through a portion of plaintiff's land to a stream. A few years thereafter, the plaintiff attempted to revoke these licenses and compel the defendant to remove the dam, and to cease to use and to fill up the ditch which he had constructed for the drain. It was held that he could not compel the removal of the dam, since that was upon the licensee's land; but that he might revoke the license for the ditch upon his own land, and have his property restored to its original condition.

The distinction here made is, in substance, that, if the effect of the oral license be to *destroy* or *impair* an easement, it can not be revoked by the licensor after the erection or change which it authorizes has been made or commenced; but if the effect be to *create* or *enlarge* an easement, it may be revoked by the licensor at any time. It follows that natural servitudes, such as the right to the natural flow of a stream, or to have one's soil supported by that of his neighbor, can not be done away with or affected by oral permission to do something upon the land of the licensee, since this would be, in effect, the *creation* of an easement over the licensor's property. If, for example, A, the owner of lower land, give to B, the owner of higher adjoining land, the right to divert upon B's land a stream which flows through both properties, or to use up all or most of its waters, this is the *creation* of a negative easement over the land of A, the licensor; and the statutes of frauds require such a contract to be in writing.¹

§ 190. (b) **Disclaimer, or Abandonment and Estoppel.** — In addition to an express release, which may terminate any easement or servitude, an abandonment of such rights, or the ceasing to use them under circumstances which indicate an intent not to resume their enjoyment and without any formal or direct contract, may also do away with them. It is "a settled doctrine of the law," says the New York Court of Appeals, "that the landowner's right in an easement may be destroyed by his abandonment of it, and that whether there has been an abandonment is a question of intention depending

¹ Veghte v. Raritan Co., 19 N. J. Eq. 142, 154.

upon the facts of the particular case.”¹ A careful examination of the facts of the cases, in which incorporeal rights have been held to have been abandoned by methods other than express release, will show that practically all of such decisions rest upon the doctrine of estoppel *in pais*; and that, when that principle is not involved, the loss of the right is in reality due to some cause other than mere abandonment, such, for example, as adverse user or prescription.

In the leading case of *Corning v. Gould*,² there was an alley-way between the land of the plaintiff and that of the defendant; and the centre line of the alley was the dividing line between their two properties. The plaintiff built upon a part of this way and ran a fence along the middle line of it, thus leaving the other half of the alley within the enclosure of his neighbor's land. In that condition the last-named land was sold to the defendant, who then occupied exclusively that portion of the alley which was inside of said dividing fence and next to his own lot. The action having been brought for damages for the obstruction of the way, it was held that, since the plaintiff had built in such a manner as to evince an intent to give up the right, and his neighbor had acted accordingly in using the land, and the property had been sold under those circumstances, the easement was at an end. In the case of *Taylor v. Hampton*,³ so frequently cited in connection with this topic, the easement was a right to flow water upon another's land for the raising of a mill pond. The owner of the mill removed it further up the stream, and established it in a new place, in such a manner as to indicate that he meant to keep it there permanently. The owner of the land, which had been flowed but was now left bare by the change in the location of the mill, converted it into a rice-field, cultivated it, and subsequently sold it in that condition. It was held that the owner of the mill, after retaining it in its new position for nine years, could not restore it to its former site and again flow the land thus used for the raising of rice. In each of these cases, the owner of the right had so acted as to represent, or he reasonably presumed to have represented, that he did not intend to use it again; he had done this in such a way as reasonably to induce the other to act upon the repre-

¹ *Foot v. Elevated Railroad*, 147 N. Y. 367, 371.

² 16 Wend. (N. Y.) 531. See also *Partridge v. Gibert*, 15 N. Y. 601.

³ 4 McCord (S. C.), 96.

sentation, and that other had justifiedly so acted, and would suffer injury in consequence if the representation were denied. The former owner of the easement was accordingly estopped to reclaim its enjoyment. So, where one who owned an easement over a street believed that he owned also the soil in fee and wrongfully enclosed it, it was held that he had not thereby abandoned his easement; but it was declared that an abandonment would have resulted, if by his conduct others had been induced to act on the belief that the right was extinguished.¹ There are probably no well-considered cases in which it has been decided that the mere failure to enjoy an easement or servitude for less than the prescriptive period, however emphatic may have appeared the intention to relinquish it, constituted a destruction of the right, unless the party favorably affected thereby had changed his position, or might at least reasonably be presumed to have changed it, on the faith of the representation thus made.² In *Moore v. Rawson*,³ which has been called the leading case upon this topic, it was held that the plaintiff, after taking down a wall containing windows for which he had an easement in the light and air over his neighbor's lot and building a solid blank wall in its place, could not recover against the adjoining owner for an obstruction to the light and air of windows which he subsequently opened in

¹ *White's Bank v. Nichols*, 64 N. Y. 65; also *White v. M. R. Co.* 139 N. Y. 19; *Snell v. Levitt*, 110 N. Y. 595. In commenting upon the last two cases cited the New York Court of Appeals says: "The peculiar features in the *White* and *Snell* cases, which have been referred to, were, in the one an express authorization to build the elevated railroad, and, in the other, an express relinquishment of an easement to conduct water; upon both of which agreements the parties favorably affected thereby had acted." *Foot v. El. R.*, 147 N. Y. 367, 371. And again the same court says: "This court has several times held that a release or abandonment of the easement of light, air, and access which are appurtenant to property abutting upon a public street may be established by any evidence which clearly indicates an intention upon the part of an abutting owner to abandon the right, at least where it has been acted upon by the other party." *Conabeer v. N. Y. C. &*

H. R. R. Co., 156 N. Y. 474, 485, citing the above cases and *Ward v. Met. El. R. Co.*, 152 N. Y. 39.

² Mr. Washburn reaches this same conclusion as to title to corporeal hereditaments. After summarizing the cases, he concludes: "It is probably, therefore, not too strong a conclusion to assert, that in no case can a man lose his title to a freehold in land by any act or oral declaration of abandonment, unless it comes within the category of estoppel, or is followed by such a possession by the person claiming title thereto in his stead as brings the case within the statute of limitations." 3 *Wash. R. P.* (5th ed.) p. 72, p. *457, par. 5 (see 6th ed. § 1888). See also *Vogler v. Geiss*, 51 Md. 407, 411; *Pope v. Devereux*, 5 Gray (Mass.), 409; *Erb v. Brown*, 69 Pa. St. 216; *Collins v. St. Peters*, 65 Vt. 618; *Ermentrout v. Stitzel*, 170 Pa. St. 540; *Dyer v. Sanford*, 9 Met. (Mass.) 395, 402.

³ 3 *Barn. & C.* 332.

the new wall. And the decision was placed upon the ground that "By building the blank wall he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such person from carrying those purposes into effect."¹ This is as far as either reason or authority appears to carry the principle. And the following statement of Lord Campbell, C. J., in speaking of the intention to abandon and the communication of that intention to the servient owner, appears to be in accord with the weight of authority, both ancient and modern. He says: "I doubt whether the communication of that intention destroys the right until the communication is acted upon. Then it certainly does."² It follows that mere use of an easement for a purpose not authorized, its excessive use or misuse, or the failure to employ it for a brief time, is not in itself sufficient to constitute an abandonment. These acts do not of themselves make such representations as, when acted on by the other party, preclude the owner of the right from subsequently insisting on its enjoyment.³

When the giving up of the right is in favor of the public, and the offer so made is accepted by the public, an abandonment by dedication results. In the case of *Regina v. Chorley*,⁴ where the defendant owned a private right of way to his malt house over the plaintiff's land, the court said that if he had removed the house and walled up the entrance and acquiesced in the use of the road by the public, this would have been an abandonment of the easement. So, when a railroad company removes its tracks from a public street in a way which indicates a relinquishment of its rights therein, or a telegraph or telephone company takes down its poles and wires so as to leave the public highway unobstructed, an abandonment of such rights results from the fact that there is a dedication to the public of the unobstructed street or road.⁵ In the last analysis, these methods also are abandonments

¹ Wash. Ease. (4th ed.) p. 712, p. *547.

² *Stokoe v. Singers*, 8 E. & B. 31, 39.

³ *Roby v. N. Y. C. & H. R. R. Co.*, 142 N. Y. 176, 181; *White's Bank v. Nichols*, 64 N. Y. 65; *Hayford v. Spokesfield*, 100 Mass. 491; *Jamaica Pond Aqueduct Co. v. Chandler*, 121 Mass. 3; *Vinton v. Greene*, 158 Mass. 426; *Chew*

v. Cook, 39 N. J. Eq. 396; *Duncan v. Rodecker*, 90 Wis. 1.

⁴ 12 Q. B. 515.

⁵ *Jones v. Van Bochove*, 103 Mich. 98; *Henderson v. Central Park R. Co.*, 21 Fed. Rep. 358; *Hickox v. Chicago & C. S. Ry. Co.*, 78 Mich. 615; *Roanoke Investment Co. v. Kansas City & S. E. R. Co.*, 108 Mo. 50.

resulting from estoppel *in pais*; since it is the act of the public, upon the faith of the representation made by the owner of the right, which completes the destruction of the easement or servitude. If, therefore, the public have not acted on the assumption of the relinquishment of an easement, its owner may restore it and use it again.¹

There are a few cases in which incorporeal rights have been said to have been abandoned, where the owners have simply ceased to use them during the entire prescriptive period, or they have been adversely obstructed by the servient tenant during that length of time.² While it is, of course, true, in the broad sense of the term, that one does abandon such property by giving it up for so long a time as to preclude himself from subsequently claiming it, it is equally apparent that the destruction of easements and servitudes in such ways is logically to be discussed under the topics non-user and adverse obstruction or prescription. These methods of losing such rights are to be next examined.

The burden of proving an abandonment, thus resting upon the doctrine of estoppel *in pais*, is upon him who asserts that the easement or servitude has been so extinguished; and he must support his contention by clear and unequivocal evidence.³

§ 191. (c) **Non-user.** — Mere non-user for any length of time of an easement or servitude arising by any method other than prescription does not of itself work an extinguishment.⁴ The fact that the right has not been enjoyed for a long period is an item of evidence, to aid in proving an abandonment; but, in order to make such proof complete, an intention to

¹ Hestonville M. & F. Pass. R. Co. v. Phila., 89 Pa. St. 210.

² Crossley v. Lightowler, L. R. 2 Ch. App. 478, 482; Veghte v. Raritan, etc. Co., 19 N. J. Eq. 142, 156; Prescott v. Phillips, cited 6 East, 213; Hillary v. Waller, 12 Ves. 239, 265. See Smyles v. Hastings, 22 N. Y. 217, 224; Steere v. Tiffany, 13 R. I. 568; Wilder v. St. Paul, 12 Minn. 192, 208; Hall v. McCaughey, 51 Pa. St. 43; Owen v. Field, 102 Mass. 90, 114; Corning v. Gould, 16 Wend. (N. Y.) 531, 535.

³ Hennessy v. Murdock, 137 N. Y. 317, 325; Richardson v. McNulty, 24 Cal. 339; Waring v. Crow, 11 Cal. 366;

Beaver Brook Reservoir Co. v. St. Vrain Reservoir Co., 6 Colo. App. 130.

⁴ Crossley v. Lightowler, 3 Eq. 279; Carr v. Foster, 3 Q. B. 581; Canabeer v. N. Y. C. & H. R. R. Co., 156 N. Y. 474; Hennessy v. Murdock, 137 N. Y. 317; Welsh v. Taylor, 134 N. Y. 450; White v. Manhattan R. Co., 139 N. Y. 19; Horner v. Stillwell, 35 N. J. L. 307; Dill v. Camden Board of Education, 47 N. J. Eq. 441; Butterfield v. Reed, 160 Mass. 361; Eddy v. Chace, 140 Mass. 471; Steere v. Tiffany, 13 R. I. 568; Lathrop v. Elsner, 93 Mich. 599; Pa. R. Co. v. Borough of Freeport, 138 Pa. St. 91.

relinquish and an estoppel *in pais* must be established by all the evidence, and this is not accomplished by showing non-user alone.¹ The owner of the privilege is under no obligation of any kind to use it, unless he has voluntarily assumed such obligation; and, therefore, while he merely fails to enjoy it, he is to be considered as still retaining his claim until the contrary is clearly shown against him.

The same reasoning may appear to apply to an easement or servitude acquired by prescription. But there are numerous *dicta*, by the best courts, to the effect that rights which have been obtained in that manner may be extinguished simply by the subsequent failure of their owners to make use of them during the prescriptive period. Thus, it has been said by the New York Court of Appeals that "A right acquired by prescription may be lost by non-user; but it cannot be lost or extinguished by mere non-user, when it has been acquired by deed."² Bracton declared that "incorporeal rights acquired by use may be equally lost by disuse."³ The same statement was made by Lord Erskine in *Hillary v. Waller*,⁴ and by Judge Story in *Hazard v. Robinson*;⁵ and in *Corning v. Gould*,⁶ after stating that Mr. Evans and Chancellor Kent inclined, with the civil law, to the rule that something more than mere non-user for the prescriptive term is necessary to work a legal destruction of such a right, Judge Cowen says: "The doctrine in the English and American cases cited is otherwise, and, in 1823, the court of appeals, in Maryland, expressly recognized the effect of simple non-user." In many cases, moreover, the judges are careful to state that easements "*created by grant*" can not be destroyed by non-user alone, thus implying the opinion that they might be so done away with if they arose by prescription.⁷ On the other hand, there are several judges and writers who have discarded this distinction. In *Veghte v. Raritan Water Power Co.*,⁸ for example, Chancellor Zabriskie said: "I do not find any decisions founded on this distinction, and it

¹ *Moore v. Rawson*, 3 Barn. & C. 332; *Eddy v. Chace*, 140 Mass. 471; *Roby v. N. Y. C. & H. R. R. Co.*, 142 N. Y. 176; *White's Bank v. Nichols*, 64 N. Y. 65, 74; *Pratt v. Sweetser*, 68 Me. 344.

² *Smyles v. Hastings*, 22 N. Y. 217, 223.

³ Bract. Lib. 4; 3 Kent Comm. p. *448, note.

⁴ 12 Ves. 239, 265.

⁵ 3 Mason (U. S. Cir. Ct.), 272, 276.

⁶ 16 Wend. (N. Y.) 531, 536.

⁷ First two notes to this section.

⁸ 19 N. J. Eq. 142, 156.

would seem to be unfounded, as prescription is based upon the presumption of a grant."

The most satisfactory theory upon which are based prescriptive rights is the presumption of a grant *or some other legal origin*.¹ If such a presumption can arise from a prescribed period of user, it is logical and just to assume, from an equal period of non-user, that the right never in fact existed, or that it has been in some legal way extinguished.² For the purpose of quieting titles and preventing litigation over stale claims, the servient tenant should be allowed to overcome the effect of proof of use for twenty years by counter proof of subsequent failure to enjoy for twenty years. But the only instances in which mere non-user should produce such a result are those in which the owners of the rights have voluntarily failed to employ them during the prescriptive period. A continuous easement—such, for example, as the right to have water flow from a stream upon one's land for irrigation purposes—should not be lost because its usefulness was interrupted for a long time by natural causes; as, in the case supposed, by the natural failure of the stream for many years to rise to a sufficient height to supply the irrigating waters.

Discontinuous easements gained by prescription and continuous rights so acquired, which are intentionally shut off and relinquished by their owners, should be extinguished by their non-user during the prescriptive period. While there is a scarcity of actual adjudications in favor of this proposition, yet, as shown above, it has many strong *dicta* for its support and is not opposed by any decided cases.

In some of the western states and territories of this country, and in Louisiana, it is expressly provided by statute that easements obtained by prescription may be lost by the subsequent failure of their owners to enjoy them during the prescriptive period.³

§ 192. (d) **Adverse Obstruction, or Prescription.**—It has been shown that the cessation of the user of a prescriptive easement or servitude, for the period of time requisite to gain title by prescription, is regarded by some courts as sufficient

¹ § 163, *supra*.

² *Corning v. Gould*, 16 Wend. (N. Y.) 531, 535.

³ Cal. Civ. Code, §§ 801-811; Mont. Civ. Code (1895), §§ 1250-1260; N.

Dak. Rev. Code (1895), §§ 3351-3361; S. Dak. Comp. Laws (1887), §§ 2760-2770; La. Code, §§ 790-804; 1 Stim. Amer. Stat. L. §§ 2157, 2290.

of itself to extinguish the right.¹ It has also been explained how non-user for any considerable length of time, accompanied by acts or representations on the part of the dominant owner, which may be assumed to be meant to induce the servient tenant to act upon them, and which have that effect and so work an estoppel *in pais*, results in a destruction of easements and servitudes by abandonment.² The owner of the privilege or claim is, in both of these cases, the one who causes its destruction. When, on the other hand, the servient proprietor adversely shuts off in some way the enjoyment of the incorporeal right, and this continues during the entire prescriptive period, the termination of the easement or servitude is caused by adverse obstruction, or prescription.³ If, for example, one have the right to flow the land of another for the purpose of raising a mill pond, the continued, peaceable, and uninterrupted occupation of the land by its owner for twenty years or more, under a claim adverse to the right of flowage, extinguishes the easement.⁴ And if the servient tenant build a wall, fence, or house across a way which is owned by his neighbor, and thus for twenty years prevent the enjoyment of the road or path, the easement is thereby done away with.⁵

In order thus to extinguish such an incorporeal right, the adverse obstruction or denial of the right must have the same requisites as those heretofore summed up as necessary to the *acquisition* of easements by prescription.⁶ And this means, in brief, that the acts or conduct of him who is so destroying the right must be of such a nature as to expose him to an action at law or in equity brought by the owner of the easement or servitude at any time before the period of prescription is complete.⁷ In the process of destroying this property right of the dominant owner, the hostile party is in reality

¹ § 191, *supra*.

² § 190, *supra*.

³ Woodruff v. Paddock, 130 N. Y. 618; Townsend v. McDonald, 12 N. Y. 381; Dill v. Camden Board of Education, 47 N. J. Eq. 441; Smith v. Langewald, 140 Mass. 205; Wimer v. Simmons, 27 Oreg. 1; Yankee Jim's Water Co. v. Crary, 25 Cal. 504.

⁴ Chandler v. Jamaica Pond Aqueduct Co., 125 Mass. 544.

⁵ Drewett v. Sheard, 7 C. & P. 465; Welsh v. Taylor, 134 N. Y. 450; Yeakle

v. Nace, 2 Whart. (Pa.) 123, 125; Shields v. Arndt, 4 N. J. Eq. 234.

⁶ Smyles v. Hastings, 22 N. Y. 217; Chandler v. Jamaica Pond Aqueduct Co., 125 Mass. 544; Horner v. Stillwell, 35 N. J. L. 307; James v. Stevenson (1893), App. Cas. 162; Mason v. Horton, 67 Vt. 266.

⁷ Cases cited in preceding note; also State v. Suttle, 115 N. C. 784; Humphreys v. Blasingame, 104 Cal. 40; Sullivan v. Zeiner, 98 Cal. 346; §§ 155-162, *supra*.

acquiring an adverse right against him; and it must be shown that such adverse right was obtained in the manner required for the gaining of prescriptive titles.¹ When the requisites thus demanded are established, the result may be the destruction of any easement or servitude, no matter by what method it was acquired.²

§ 193. (e) **Destruction of that upon which the Right depends.** — The partial destruction of the servient property does not extinguish an easement or servitude, provided enough of it remains to enable the owner of the right to continue its enjoyment.³ But, when that in, upon, or over which the right exists has been so substantially destroyed that it can not be used as it formerly was, the easement or servitude is done away with,⁴ unless the parties have directly stipulated to the contrary,⁵ or subsequently act in such a manner as to show an intention to have the right continued.⁶

Thus, a right of way through the halls and stairways of a house, whether to reach the upper stories of the same building or to enter other structures of the dominant owner, is ended by the destruction of the house; and the owner of the easement can not compel its restoration by requiring that the house, or any part of it, shall be rebuilt.⁷ So, where one house is supported by the wall of another, or both buildings make use of a party wall erected upon the dividing line between them, the substantial destruction of the wall, even though its foundation may still remain, terminates the easements enjoyed in it by the landowners.⁸ Likewise, where the land, to which a right of way over adjoining property was appurtenant, was entirely taken away from its owner by a change in the bed of the Mississippi River, the easement was thereby destroyed.⁹ And a way granted to a widow, to enable her to enjoy her dower land, ceases when she dies and her dower interest is thereby terminated.¹⁰

¹ *State v. Suttle*, 115 N. C. 784.

² *Mason v. Horton*, 67 Vt. 266; *Welsh v. Taylor*, 134 N. Y. 450.

³ *Bonney v. Greenwood*, 96 Me. 335.

⁴ *Shirley v. Crabb*, 138 Ind. 200; *Heartt v. Kruger*, 121 N. Y. 386; *Pierce v. Dyer*, 109 Mass. 374.

⁵ *O'Neil v. Van Tassel*, 137 N. Y. 297.

⁶ *Douglas v. Coonley*, 156 N. Y. 521.

⁷ *Shirley v. Crabb*, 138 Ind. 200.

⁸ *Heartt v. Kruger*, 121 N. Y. 386; *Partridge v. Gibert*, 15 N. Y. 601;

Pierce v. Dyer, 109 Mass. 374; *Hoffman v. Kuhn*, 57 Miss. 746; *Bonney v. Greenwood*, 96 Me. 335. But, by contract, the parties may make such a wall right permanent. *O'Neil v. Van Tassel*, 137 N. Y. 297.

⁹ *Weis v. Meyer*, 55 Ark. 18.

¹⁰ *Hoffman v. Savage*, 15 Mass. 130; also *Central Wharf v. India Wharf*, 123 Mass. 561, 567; *Mussey v. Union Wharf*, 41 Me. 34.

In like manner, if an easement exist as appurtenant simply to a certain dwelling-house, mill, or other structure, and the building to which it so belongs be destroyed, the right is thereby brought to an end. But a distinction must be here carefully noted between such a privilege as appurtenant *to the land generally*, though used for the benefit of a building upon it, and one simply appurtenant to the building *as such*. In the latter case, the destruction of the building terminates the easement; while, in the former, the right continues in favor of similar structures erected in place of that for which it was at first enjoyed.¹ So if the structure, in connection with which alone an easement exists, be destroyed and then within a reasonable time rebuilt in substantially the same form in which it was before, the right revives in favor of the dominant owner. The owner of a house and lot had a right to the use of the stairway of his neighbor's building, and thence through a door in a party wall to his own rooms above. Both houses having burned, they were rebuilt in practically the same form in which they had previously existed. In an action to recover again the use of the stairway and door through the party wall, it was held that, while the owner of the servient property might have built differently or not at all, and thus might have wholly destroyed the easement which had been suspended, yet the building of the houses as they were before showed that their owners considered this as the best way to use the properties; and the easement accordingly revived.²

§ 194. (f) **Extinguishment and Suspension by Union of the Dominant and Servient Estates.** — Since the ownership of property carries with it the right to its general use and enjoyment, ordinarily no person can have an easement or servitude over his own land. He employs it as he may please, as his own, and not by virtue of any rights against any other person or property. Therefore the union of the dominant and servient estates, in the same person and in one and the same right, will usually extinguish an easement which has belonged to the former estate.³ Accordingly, where the

¹ *Day v. Walden*, 46 Mich. 575, 586. The land of course remaining, the right which is appurtenant *to the land*, rather than to the building, remains. That on which it depends is not destroyed.

² *Douglas v. Coonley*, 156 N. Y. 521;

Shirley v. Crabb, 138 Ind. 200; *Hoffman v. Kuhn*, 57 Miss. 746.

³ *James v. Plant*, 4 Adol. & El. 749; *Dynevov v. Tennant*, L. R. 13 App. Cas. 279; *Damper v. Bassett* (1901), 2 Ch. 350; *Atlanta Mills v. Mason*, 12

absolute owner of a parcel of land, to which was appurtenant the right of drawing water through aqueduct pipes over adjacent property, bought the servient tenement, the easement was at once extinct.¹ And when the owner of a right of way purchased the field over which the pathway ran, the easement as such was at an end.²

But, in order that an extinguishment may thus result, the person who acquires the two tenements must have at the same time the same estate of inheritance in both, "equal in validity, quality, and all other circumstances of right."³ And, if his title to one of them be defeated because it was not perfect, as he supposed, the union in him of the possession and seisin of the two pieces of land will not be held to have destroyed the easement previously existing.⁴ It follows that, when the owner of only an undivided interest in one of the tenements, such as one of several joint-tenants or tenants in common thereof, acquires title to the other tenement, or when the owner in severalty of one of the pieces obtains an undivided interest in the other, the uniting of such titles in him does not extinguish an easement.⁵

It is also a consequence of the principle last stated that, when the same person is the absolute owner of one of the parcels of land (in fee), and of the other for life, or for a term of years however long or short it may be, this does not result in the destruction of any easement or servitude. It simply suspends any such rights during the continuance of the temporary estate; and they revive again when the possession and enjoyment of the two tenements are again separated, as by the death of the life tenant or the expiration of the estate for years.⁶

Mass. 244; *Parsons v. Johnson*, 68 N. Y. 62, 66; *Denton v. Leddell*, 23 N. J. Eq. 64; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Dority v. Dunning*, 78 Me. 381; *Plimpton v. Converse*, 42 Vt. 712; *McIllister v. Devane*, 76 N. C. 57; *Howell v. Estes*, 71 Tex. 690.

¹ *Nichols v. Chamberlain*, Cro. Jac. 121; *Sucy v. Pigot*, Poph. 166.

² *Parsons v. Johnson*, 68 N. Y. 62.

³ 2 Wash. R. P. (6th ed.) § 1316, p. * 85; *Thomas v. Thomas*, 2 Cr. M. & R. 34, 41; *Dority v. Dunning*, 78 Me. 381; *Tyler v. Hammond*, 11 Pick. (Mass.) 193, 195; *Atlanta Mills v. Mason*, 120 Mass. 244.

⁴ *Tyler v. Hammond*, 11 Pick. (Mass.) 193.

⁵ *Atlanta Mills v. Mason*, 120 Mass. 244. The most that could ever result from such a partial unity of ownerships would be a temporary suspension of the right while the co-tenant of one piece was the entire owner of the other; and a complete revival and restoration of it when by sale or otherwise such partial merger of the two estates was terminated. *Bradley Fish Co. v. Dudley*, 37 Conn. 136, 144.

⁶ *Thomas v. Thomas*, 2 Cr. M. & R. 34, 41; *Pearce v. McClenaghan*, 5 Rich. (S. C.) 178; *Dority v. Dunning*, 78

It is to be added that, even in cases where such rights have been wholly extinguished by the coming together of the two estates, if the ease or accommodation, which when the two parcels of land were separately owned constituted an easement or servitude in or over one of them in favor of the other, remain as apparent and reasonably necessary to the enjoyment of that which had been the dominant tenement, then, upon the division of the two corporeal properties again by the conveyance of one of them, it will again come into existence as an easement or servitude, although no express words to that effect are used in the instrument of conveyance.¹ But it is not accurate to speak of such a result as the *revival* of a pre-existing right, which had been dormant or suspended for a season. It is the *creation of a new right*, similar to or identical with that which had existed before. When it is an easement, such as a right of way or a right of drainage, it is brought into existence by implied grant upon the severance of an entire estate.² When it is a mere servitude, such as the right to lateral support of soil or to the ordinary flow of a stream, it is a right which exists again as such by nature as soon as the two ownerships are distinct.³ When an easement is merely *suspended* by the temporary union of the two tenements, the possessor of them can not lawfully destroy the right, or prevent it from reviving when they are again separated.⁴ But, when the permanent union of the two titles *extinguishes* an incorporeal hereditament, their owner is, of course, at liberty to so alter their condition as to prevent any such right from ever again springing into existence; or he may do this by an express denial of the right to his grantee in the conveyance of one of the parcels of land.⁵

Me. 381; *Hollenbeck v. McDonald*, 112 Mass. 247; *Brewster v. Hill*, 1 N. H. 350; *Chapman v. Gray*, 15 Mass. 439; *Gay, Petitioner*, 5 Mass. 419.

¹ *Fritz v. Tompkins*, 168 N. Y. 524; *Grant v. Chase*, 17 Mass. 443; *McCarty v. Kitchenman*, 47 Pa. St. 239; *In re Bull*, 15 R. I. 534; *Miller v. Lapham*, 44 Vt. 416; *Ferguson v. Witsell*, 5 Rich. (S. C.) 280; *Rightsell v. Hale*, 90 Tenn. 556; *Dunklee v. Wilton R. Co* 24 N. H. 489.

² §§ 139, 140, *supra*; *Spencer v. Kilmer*, 151 N. Y. 390.

³ § 181, *supra*; *Johnson v. Jordan*, 2 Met. (Mass.) 234; *Collier v. Pierce*, 7 Gray (Mass.), 18, 20.

⁴ *Ibid.*

⁵ *Manning v. Smith*, 6 Conn. 289; *Collier v. Pierce*, 7 Gray (Mass.), 18, 20; *Johnson v. Jordan*, 2 Met. (Mass.) 234, 239; *Huttemeier v. Albro*, 18 N. Y. 48; *Parsons v. Johnson*, 68 N. Y. 62; *Duval v. Becker*, 81 Md. 537.

§ 195. (g) **Extinguishment by Excessive Claim or User.** — The owner of an easement or servitude has no right, merely of his own volition, to increase its burden upon the servient property; and, if he do so, it is settled that the owner of the latter may recover damages at law for the injury or enjoin its continuance by a suit in equity.¹ It was, at one time, thought to be the law of England that, for such unauthorized excessive use or claim, the owner of the privilege might be compelled to relinquish it altogether and that the servient land should in consequence be relieved of the entire burden.² But the rule now established, both there and in so far as the question has arisen in this country also, is that, if that which is wrongfully and excessively claimed or enjoyed can be distinguished and separated from that which is rightfully owned, this will be done and only the excessive amount will be taken away and prohibited.³ When, however, such separation and distinction can not be made, the prohibition of the excessive claim results in the destruction also of the entire original right.⁴ Thus, in a number of cases in which the owner of a house enjoying an easement in light and air has enlarged the window and sought thus to impose an additional burden upon his neighbor's land, the question has arisen as to whether for that reason the entire window could be closed, or whether simply the excessive portions could be darkened; and it has been held that only the latter remedy could be enforced if the original window could be certainly located and restored.⁵ But where the owner of a stable, the boards on which had shrunk so that he could put small window-panes into the crevices, made diminutive windows in this way; and, after he had acquired a prescriptive right under the

¹ *Wood v. Copper Miner's Co.*, 14 C. B. 428, 446; *Sharpe v. Hancock*, 7 Mann. & G. 354; *Chandler v. Thompson*, 3 Camp. 80; *Mendell v. Delano*, 7 Met. (Mass.) 176.

² *Garritt v. Sharp*, 3 Adol. & El. 325; *Jones v. Tapling*, 11 C. B. n. s. 283; *Blanchard v. Bridges*, 4 Adol. & El. 176; *Cherrington v. Abney Mill*, 2 Vern. 646; *Hutchinson v. Copestake*, 9 C. B. n. s. 863; *Binckes v. Park*, 11 C. B. n. s. 324; *Renshaw v. Bean*, 18 Q. B. 112.

³ *Luttrell's Case*, 4 Rep. 84 b, 86; *Chandler v. Thompson*, 3 Camp. 80;

Tapling v. Jones, 13 C. B. n. s. 876; *Allan v. Gomme*, 11 Adol. & El. 759; *Renshaw v. Bean*, 18 Adol. & El. n. s. 111; *Mendell v. Delano*, 7 Met. (Mass.) 176; *McDonald v. Bear River Co.*, 13 Cal. 220; *Carlisle v. Cooper*, 6 C. E. Green (N. J.), 576, 595.

⁴ *Blanchard v. Bridges*, 4 Adol. & El. 176; *Hutchinson v. Copestake*, 9 C. B. n. s. 863; *Renshaw v. Bean*, 18 Q. B. 112.

⁵ *Luttrell's Case*, 4 Rep. 86, 89; *Chandler v. Thompson*, 3 Camp. 80; *Tapling v. Jones*, 13 C. B. n. s. 876.

English doctrine of ancient light, gradually widened the openings and then placed in larger windows, it was decided that, since the rightful claim could not be restored to its original condition, the neighboring landowner might build in such a manner as entirely to shut out the light and air from the windows.¹ It is conceived that this distinction is sound; and that whether or not an excessive claim may result in extinguishing an easement or servitude is to be determined by the general principle of law that a right will not be lost or destroyed by its connection or association with a wrong, if the two things can be fairly and accurately separated.²

§ 196. **Remedies for Obstructions or Injuries to Easements and Servitudes.** — When the servient tenant does or permits anything which interferes with the enjoyment of an easement or servitude, its owner has one or more of three different remedies; namely, abatement, an action at law for damages, and a proceeding in equity.

When the use of the right is obstructed, as by a wall, or gate, or house, the party thereby injured may lawfully remove the obstacle, if he can do so without any breach of the peace.³ And, when a public way or servitude is so interfered with, any citizen who is thereby inconvenienced may remove the obstruction. Such acts of removal are abatements of nuisances. “And the reason why the law allows this private and summary method of doing one’s self justice is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and can not wait the slow progress of the ordinary forms of justice.”⁴

Or he whose right is thus interfered with may maintain an action at law — usually trespass on the case, or simply an action for damages under the codes — for each distinct act

¹ *Garritt v. Sharp*, 3 Adol. & El. 325.

² The principle appears, in the law of personal property, in the rules applicable to confusion of goods. 2 Blackst. Com. p. *405.

³ *Sargent v. Hubbard*, 102 Mass. 380; *Morgan v. Boyes*, 65 Me. 124; *Quintard v. Bishop*, 29 Conn. 366; *Joyce v. Conlin*, 72 Wis. 607.

⁴ Chase’s Blackst. p. 621. “Although the court may have refused a mandatory injunction for the removal of a house which obstructed a right of way, if the

right of way is established, the party entitled to it may assert the right at common law, and may, after notice and request to remove the obstructing house, pull it down, although it is actually inhabited; and under such circumstances a court of equity will grant leave to the party entitled to the way . . . to pursue any remedies or to do any acts he can lawfully take or do to abate the obstruction.” Jones, *Ease*. § 891, citing *Laue v. Capsey* (1891), 3 Ch. 411; *Davies v. Williams*, 16 Q. B. 546.

of injury to his easement or servitude.¹ When the plaintiff is in possession of land to which the right is appurtenant, he may have an action for *any* injury to such right. Thus, a tenant at will, or for years, a life tenant or an owner in fee simple may then maintain his action.² A person not in possession — a reversioner or remainderman — has a right of action when the wrong done is of such a permanent character that his interest in the land is thereby injuriously affected.³ (a)

Generally, when the owner of an easement or servitude has at law a complete and adequate remedy for an interruption of his right or an interference with it, equity will not entertain any application for relief.⁴ But, when the court of law affords

(a) In New York, the owner or possessor of what is claimed by another to be the *servient* tenement of an easement or servitude may also have an action for the determination of such claim. "Where a person has been, or he and those, whose estate he has, have been for one year in possession of real property, or of any undivided interest therein, claiming it in fee, or for life, or for a term of years not less than ten, he may maintain an action against any other person to compel the determination of any claim adverse to that of the plaintiff, which the defendant makes to any estate in that property, . . . including any claim in the nature of an easement therein, whether appurtenant to any other estate or lands or not." N. Y. Code Civ. Pro. § 1638. And the procedure in such an action is fully prescribed in the following sections of that code, §§ 1639-1650.

¹ Osborne v. Butcher, 26 N. J. L. 308; Hancock v. McAvoy, 151 Pa. St. 460; Bowers v. Suffolk Mfg. Co., 4 Cush. (Mass.) 322; Child v. Chappell, 9 N. Y. 246.

² Baxter v. Taylor, 4 Barn. & Ad. 72; Hamilton v. Dennison, 56 Conn. 359; Hastings v. Livermore, 7 Gray (Mass.), 194; Noyes v. Hemphill, 58 N. H. 536, 557; Com. Dig. Action on the Case for a Nuisance, B.

³ Bell v. Midland R. Co., 10 C. B. N. S. 287; Metropolitan Ass'n v. Petch, 5 C. B. N. S. 504; Brown v. Bowen, 80 N. Y. 519; Richardson v. Bigelow, 15 Gray (Mass.), 154; Tinsman v. Belvidere, etc. R. Co., 1 Dutch. (N. J.) 255. The quantity of damages is to be measured by the extent of the injury actually done by the wrongful act. Gilmore v. Driscoll, 122 Mass. 199; Schile v. Brokhahus, 80 N. Y. 614; Shafer v. Wilson, 44 Md. 268, 280. But it should never include an estimated amount for future injury, for the defendant may stop the wrong-doing at any moment. Bare v.

Hoffman, 79 Pa. St. 71. Actual loss to one's business, occasioned by the nuisance, may be included; and when a stream used for irrigation purposes is diverted, the damages embrace the amount of injury accruing from consequent loss of crops. Shafer v. Wilson, 44 Md. 268, 280; Schile v. Brokhahus, 80 N. Y. 614; Ellis v. Tone, 58 Cal. 289; Hanover Water Co. v. Ashland Iron Co., 84 Pa. St. 279. See also White v. Dresser, 135 Mass. 150; Ourisler v. B. & O. R. Co., 60 Md. 358; Demuth v. Anweg, 90 Pa. St. 181. When no actual damages accrue, but the right is invaded by the defendant, the action at law lies, nevertheless, for the obstruction; and nominal damages at least may be recovered. Collins v. St. Peters, 65 Vt. 618; Chase's Blackst. p. 717 *et seq.*

⁴ Goodhart v. Hyett, L. R. 25 Ch. Div. 182; Pattison v. Gilford, 18 Eq. 259, 262; Jones v. Adams, 162 Mass. 224; Earley's Appeal, 121 Pa. St. 496.

no remedy, or only an inadequate one, then the court of equity will act, by way of injunction, to restrain irreparable mischief, or to suppress continued and oppressive litigation, or to prevent a multiplicity of suits.¹ Thus, relief will be interposed by injunction to prevent the diversion of a natural stream and to restore it to its former condition when it has been wrongfully diverted; for a court of law could only give damages for the injury and could not otherwise stop or prevent it. Besides, if the party aggrieved must look to law alone for his redress, he must continue to bring successive actions for damages, and these are obviated by the injunction granted by equity.² So, for the continuous pollution of a natural stream,³ or the interference with street rights by a permanent elevated railroad or other structure,⁴ and generally for any lasting interruption or interference, equity will grant relief by means of an injunction.⁵ The injunction so issued is merely prohibitory, when its only object is to put a stop to the unauthorized and wrongful acts; and it is mandatory when it aims to compel the removal of obstructions and the consequent restoration of the easement or servitude to its proper condition.⁶ That court also may, and frequently does, in the one proceeding, award damages in compensation for injuries already sustained because of past obstructions or interferences.⁷

¹ 2 Story, Eq. Jur. §§ 925, 926; *Carlisle v. Cooper*, 6 C. E. Green (N. J.), 576, 591; *Coe v. Winnipiseogee Mfg. Co.*, 37 N. H. 254; *Webber v. Gage*, 39 N. H. 182.

² *Corning v. Troy I. & N. Factory*, 40 N. Y. 191.

³ *Harris v. Mackintosh*, 133 Mass. 228; *Lyon v. McLaughlin*, 32 Vt. 423, 425.

⁴ *Story v. N. Y. El. R. Co.*, 90 N. Y. 122; *Thompson v. Man. R. Co.*, 130 N. Y. 360; *Pegram v. N. Y. El. R. Co.*, 147 N. Y. 135; *Koehle v. N. Y. El. R. Co.*, 159 N. Y. 218; *Pa. R. Co. v. Duncan*, 111 Pa. St. 352. These elevated railroad cases are a few of the many in which injunctions have been obtained against the defendants, to take effect in case damages, also adjudged, were not duly paid to the plaintiffs. In such cases, the damages being paid or the matters otherwise adjusted by the parties after judgment

is entered, the injunction does not become operative. This has become the favorite and ordinary method of suing, for the ultimate purpose of simply obtaining damages, in the elevated railroad cases and similar injuries. See also *Muhler v. N. Y. & H. R. Co.*, 173 N. Y. 549; *Robinson v. N. Y. El. R. Co.*, 175 N. Y. 219; *Dolan v. N. Y. & H. R. Co.*, 175 N. Y. 367; *N. Y. El. R. Co. v. Fifth Nat. Bk.*, 135 U. S. 432.

⁵ *Proprietors of Mills v. Braintree Water Supply Co.*, 149 Mass. 478; *Brooks v. Cedar Brook Imp. Co.*, 82 Me. 17; *Schmitzins v. Bailey*, 48 N. J. Eq. 409; *Pettigrew v. Evansville*, 25 Wis. 223; *Hicks v. Silliman*, 93 Ill. 255.

⁶ Cases cited in last four preceding notes; *Boland v. St. John's School*, 163 Mass. 229; *Nash v. New Eng. Ins. Co.*, 127 Mass. 91, 97.

⁷ *Ibid.*; *Pegram v. N. Y. El. R. Co.*, 147 N. Y. 135, 144.

CHAPTER XII.

SPECIAL FEATURES OF IMPORTANT KINDS OF EASEMENTS AND SERVITUDES.

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§ 224. (c) Rights as to percolating and subterranean waters.

§ 225. *b.* Artificial water rights.

§ 197. **Specific Easements and Servitudes.** — The foregoing discussion completes a general summary of the law of easements and servitudes. It has dealt with their essential natures and forms, the ways in which they may be acquired, and the chief characteristics of the forms of such rights which may be gained by the different methods respectively; the

incidents of them in general as incorporeal hereditaments; how they may be lost, destroyed, or suspended, and the different remedies available to their owners for injuries to them and for the preservation of their rightful use and enjoyment. There yet remains an examination, one by one, of some of the most important specific kinds of easements and servitudes. The forms which will be thus specially considered, in the order here named, are rights of way; rights to light, air, and prospect; rights to lateral and subjacent support of soil and buildings; party-wall rights and similar privileges, and water rights.

Rights of Way.

§ 198. **Private Ways.** — Ways, as private rights, are the most numerous and ordinary instances of common-law easements. They include all cases in which an individual or class of individuals has a fixed right of passage, by an established route, over land of the servient owner to and from land of the dominant owner. They may be brought into existence by any of the four methods above discussed by which easements may be acquired; namely, by express grant, by reservation in a deed of the servient tenement, by implied grant, and by prescription. They have all the characteristics and incidents which apply to easements in general; they may be lost, suspended, or destroyed by any of the methods above outlined, and the extent of the right to use them and the manner in which they may be enjoyed, altered, repaired, and improved have been already fully examined in the foregoing discussion of the general law of easements.¹ Private easements of way, therefore, are to be regarded as the typical form of such incorporeal right, and the principles relating to them embrace practically the entire body of the law of easements. A right of way in gross, which, technically speaking, is not an easement at all but a mere servitude, has been heretofore shown to be unassignable and uninheritable in most jurisdictions;² while in a few of the United States, such as Massachusetts and Wisconsin, it may be readily passed from hand to hand

¹ See discussion, *supra*, as to questions relating to their characteristics and principles.

² *Ackroyd v. Smith*, 10 C. B. 164; *Louisville & N. R. Co. v. Koelle*, 104

Ill. 455; *Pearson v. Hartman*, 100 Pa. St. 84; *Hoosier Stone Co. v. Malott*, 130 Ind. 21, 24; *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 432; §§ 126, 127, *supra*.

by the same methods by which other species of real property are transferred.¹ With this qualification, private rights of way, whether appurtenant or in gross, are all governed by substantially the same legal rules and principles.

§ 199. **Highways.** — Public ways, or highways, are in substance easements in gross existing in favor of each member of the public. Their creation and chief characteristics and how they may be lost or destroyed have been explained in the last two preceding chapters, as far as the limits of this work will permit.²

When the state or municipality acquires not only the rights of way but also the land itself over which the roads or streets are made, as is the case, for example, with many of the streets of New York City,³ the ownership by the public is of corporeal property; and the abutting owners then have special forms of servitudes over the highways in front of their lots. It has been already explained that compensation must be made to such abutters, when such rights are *directly* taken away or impaired.⁴

In the cases, which are the most usual, in which the ownership of the land remains in the original proprietors or their successors in interest, and the public acquires only servitudes over it — by public prescription, dedication, or operation of law, as above explained⁵ — the soil may be used by its owners in any manner that is consistent with full and proper enjoyment of the way by the public. Subject to this restriction, they may take minerals, trees or crops from it, cultivate it, or use it for any reasonable purpose in connection with their adjacent lands.⁶ The public servitude has its inception and limitations in the reasonable public requirements, according to the nature of each case. And, when the uses thus called for are abandoned or otherwise terminated, the land remains for its original owners or their successors freed from the burdens which the public enjoyment had imposed.⁷

¹ Bowen v. Conner, 6 Cush. (Mass.) 132; Hankey v. Clark, 110 Mass. 262; Poull v. Mockley, 33 Wis. 482; § 127, *supra*, and cases cited.

² §§ 178–180, 189, 190, *supra*.

³ Kane v. N. Y. El. R. Co., 125 N. Y. 165, 182; Fobes v. Rome, W. & O. R. Co., 121 N. Y. 505; Reining v. N. Y. L. E. & W. R. Co., 128 N. Y. 157.

⁴ § 179, *supra*.

⁵ §§ 168, 169, 172–174, 178–180, *supra*.

⁶ Higgins v. Reynolds, 31 N. Y. 151; Lane v. Lamke, 53 N. Y. App. Div. 395; Stackpole v. Healy, 16 Mass. 33; People v. Foss, 80 Mich. 559; Town of Suffield v. Hathaway, 44 Conn. 521; 1 Lewis, Em. Dom. § 132 *et seq.*

⁷ Harris v. Elliott, 10 Pet. (U. S.) 25; Bissell v. N. Y. C. R. Co., 23 N. Y.

Rights to Light, Air, and Prospect.

§ 200. **Special Features to be examined.** — When an easement in the continuous and uninterrupted flow of light, or air, or both, or in an unobstructed prospect, view, or outlook over another's land, is once shown to exist, it is a right or privilege which is subject to the same rules of law as those which govern other easements. The special discussion of these incorporeal hereditaments, therefore, relates to the particular methods by which they may be acquired and held. These will be examined in their order, first with reference to light and air and then with reference to prospect or view.

§ 201. **Express Grant or Reservation of Right to Light and Air.** — By express contract, either in the form of a direct grant, or by a reservation in a deed of the servient land, or by means of an explicit covenant, an easement in the enjoyment of light, or air, or both, may be brought into existence; and the extent and nature of the right will depend, of course, upon the proper construction of the words used in the instrument.¹ Such express stipulations ordinarily run with the land of both parties to the contract and bind all subsequent purchasers and encumbrances who take with notice of the easements.²

§ 202. **Implied Grant of Right to Light and Air.** — It is a settled doctrine of the English courts that, upon the severance of an entire tract or parcel of land and a conveyance of one of the pieces, an easement in the form of a right to enjoy light and air over the portion which the *grantor* retains may be impliedly brought into existence.³ But those courts do not go to the extent of implying any *reservation* of light or air in favor of the grantor.⁴ The principle upon which the easements can be implied against the grantor — that he will not

61; *Thomsen v. McCormick*, 136 Ill. 135; *Benham v. Potter*, 52 Conn. 248; *Healey v. Babbitt*, 14 R. I. 533; *Blackman v. Reilly*, 138 N. Y. 318.

¹ *Dalton v. Angus*, L. R. 6 App. Cas. 740; *Keating v. Springer*, 146 Ill. 481; *Lahr v. Met. El. R. Co.*, 104 N. Y. 287; *Ladd v. Boston*, 151 Mass. 585; *Weigmann v. Jones*, 163 Pa. St. 330; *Hagerty v. Lee*, 45 N. J. Eq. 1, 15; *Morrison v. Marquardt*, 24 Iowa, 35.

² *Hogan v. Barry*, 143 Mass. 538; *White's Bank v. Nichols*, 64 N. Y. 65,

73; *Lahr v. Met. El. R. Co.*, 104 N. Y. 287, 292.

³ *Leech v. Schweder*, L. R. 9 Ch. App. 463, 472; *Swansborough v. Coventry*, 9 Bing. 305; *Palmer v. Fletcher*, 1 Lev. 122; *Rosewell v. Pryor*, 6 Mod. 116; *Pollard v. Gare* (1901), 1 Ch. 834.

⁴ *Russell v. Watts*, L. R. 10 App. Cas. 590, 596; *Pollard v. Gare* (1901), 1 Ch. 834; *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1093. See *Jones, Ease.* §§ 563, 564.

be permitted to do anything in derogation of his own grant — is manifestly inapplicable as against the grantee under similar circumstances. It is held in England, however, that the principle does apply to simultaneous grants of both parcels from the same grantor to two different grantees; and that, in such a case, he who purchases the house has by implication an easement in light and air for the windows which overlook the land of the other vendee.¹

In a few of the United States, such as New Jersey, Maryland, Delaware, and Louisiana, the English doctrine in this respect is followed, with the qualification usually added that it must be shown that the easement contended for as the result of the severance of the two parcels of land is reasonably necessary to the enjoyment of the portion conveyed.² And in Pennsylvania, Connecticut, Georgia, and possibly a few other states, such a right may be brought into existence in this manner when it is a positive, actual necessity to the reasonable enjoyment of the portion granted, but not when such an absolute necessity does not exist.³ But, in the great majority of the states of this country, it is held that the conditions, under which property is rapidly improving and being transferred from hand to hand, are such that no easement in light or air should be implied when a plot or tract of land is divided and a portion of it sold,⁴ or when different parts of

¹ *Allen v. Taylor*, L. R. 16 Ch. Div. 355. It is said in a few English cases that, while the principles above stated are there fully recognized so far as the right to light is concerned, there are no positive decisions applying them to the right to air also, although the *dicta* speak of the same rules as applicable to both. And it is at least safe to say that the courts of England will not restrain a mere obstruction to air unless the complainant can show that he has been enjoying it through some definite channel or aperture, such as a window or chimney flue or other similar opening. *Aldin v. Latimer Clark* (1894), 2 Ch. 437; *Bryant v. Lefever*, L. R. 4 C. P. Div. 172; *Harris v. DePinna*, L. R. 33 Ch. Div. 238, 250.

² *Sutphen v. Therkelson*, 38 N. J. Eq. 318; *Greer v. Van Meter*, 54 N. J. Eq. 270; *Janes v. Jenkins*, 34 Md. 1; *Clawson v. Primrose*, 4 Del. Ch. 643; *Cleris*

v. Tiernan, 15 La. Ann. 316. The New Jersey courts go farther than those of England, in this respect, and permit an easement in light and air to be implied as a *reservation* in favor of the grantor; but they do not allow it to be gained by prescription. *Greer v. Van Meter*, 54 N. J. Eq. 270; *Sutphen v. Therkelson*, 38 N. J. Eq. 318; *Hayden v. Dutcher*, 31 N. J. Eq. 217.

³ *Rennyson's App.*, 94 Pa. St. 147; *Robinson v. Clapp*, 65 Conn. 365; *Turner v. Thompson*, 58 Ga. 268; *Morrison v. Marquardt*, 24 Iowa, 35; *White v. Bradley*, 66 Me. 254; *Powell v. Sims*, 5 W. Va. 1.

⁴ *Parker v. Foote*, 19 Wend. (N. Y.) 309, 315; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Knabe v. Levelle*, 23 N. Y. Supp. 818; *Doyle v. Lord*, 64 N. Y. 432, 439; *Palmer v. Wetmore*, 2 Sand. (N. Y.) 316; *Wilmurt v. McGrane*, 16 N. Y. App. Div. 412, 418; *Shipman v.*

it are conveyed at the same time to different purchasers.¹ The rule is different here, however, when a portion of the premises, such as one story of a house or a building adjoining a vacant lot, is *leased* for a term of years and the residue is retained by the landlord or by those who subsequently succeed to his rights and interests. It has been uniformly held that the tenant for years can then restrain the owner of the remaining portions of the property from obstructing the light and air which are reasonably essential to the use and enjoyment of the demised property in the manner contemplated by the parties to the lease.²

§ 203. **Ancient Lights.** — By the prescriptive act of England, it is provided that, "when the access and use of light to and for any dwelling-house, workshop or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."³ The substantial effect of that statute is to put into the form of written law the doctrine of "ancient lights," which has always been recognized in that country and which is the rule that the right to the unobstructed flow of light into windows or other openings may be acquired by prescription, in favor of a house, over the adjoining land of another owner.⁴

This English doctrine has been repudiated in all of the United States except Delaware.⁵ And there are two reasons

Beers, 2 Abb. N. C. (N. Y.) 435; Christ Church v. Lavezzolo, 156 Mass. 89; Randall v. Sanderson, 111 Mass. 114; Keating v. Springer, 146 Ill. 481; Keiper v. Klein, 51 Ind. 316; Mullen v. Stricker, 19 Ohio St. 135; White v. Bradley, 66 Me. 254.

¹ Collier v. Pierce, 7 Gray (Mass.), 18; Keats v. Hugo, 115 Mass. 204; Turner v. Thompson, 58 Ga. 268. In some states, this matter is regulated by statute. 1 Stim. Amer. Stat. L. § 2254; 4 Shars. & B. Lead. Cas. R. P. 246.

² Doyle v. Lord, 64 N. Y. 432; O'Neill v. Breese, 3 N. Y. Misc. 219; Case v. Minot, 158 Mass. 577, 584; Brande v. Grace, 154 Mass. 210; Ware v. Chew, 43 N. J. Eq. 493; Hilliard v. Gal. Coal

Co., 41 Ohio St. 662; Lapere v. Luckey, 23 Kan. 534. See Keating v. Springer, 146 Ill. 481; Keiper v. Klein, 51 Ind. 316; Haynes v. King (1893), 3 Ch. 439.

³ 2 & 3 Wm. IV. ch. 71.

⁴ Chastey v. Ackland (1895), 2 Ch. 389; Van Joel v. Hornvey (1895), 2 Ch. 774; Lord Batterson v. Comm'rs, etc. of London (1895), 2 Ch. 708; Tapling v. Jones, 11 H. L. Cas. 290; Stokes v. Singers, 8 El. & Bl. 31; Aynsley v. Glover, 18 Eq. 544.

⁵ Parker v. Foote, 19 Wend. (N. Y.) 309; Myers v. Gemmel, 10 Barb. (N. Y.) 537; Banks v. Amer. Tract Soc., 4 Sand. Ch. (N. Y.) 438, 467; Levy v. Brothers, 4 N. Y. Misc. 48; Christ Church v. Lavezzolo, 156 Mass. 89; Hayden v.

laid down by our courts, either one of which is amply sufficient ground for their refusal to follow the lead of the English tribunals in this matter. One is that it is incompatible with the condition and needs of our country, which is undergoing such rapid changes in the progress of its growth and development.¹ And the other is that the English doctrine of ancient lights is illogical and inconsistent with the principles upon which other prescriptive rights are founded, because there is no *adverse* character in the enjoyment of light through the windows of one's house over the land of his neighbor.² "The actual enjoyment of the air and light by the owner of the house is on his own land only. He makes no tangible or visible use of the adjoining lands, nor, indeed, any use of them which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment with the light and air upon his own lands, or with any use of those lands in their existing condition."³

The outcome of the American theory and practice upon this subject is that owners of land, overlooking which windows have been built by others, are not required, as is the proprietor of land in England under similar conditions, to shut out the light by erections upon their own properties before there has been a twenty years' enjoyment of it through the windows, or take the risk of being deprived, at the end of the prescriptive period, of much of the utility and value of their vacant lots. It also follows, as a logical and generally recognized consequence in this country, that, in the absence of restrictive legislation, a landowner may at any time, by fences, houses, or other erections upon his own premises, darken his neighbor's house or other structure, no matter how long it has been enjoying the unobstructed light. And, in most cases, it has been held that the courts will not inter-

Dutcher, 31 N. J. Eq. 217; Rennyson's Appeal, 94 Pa. St. 147; Keating v. Springer, 146 Ill. 481; Mullen v. Stricker, 19 Ohio St. 135; White v. Bradley, 66 Me. 254; Hubbard v. Town, 33 Vt. 295; Tunstall v. Christian, 80 Va. 1. In Delaware it has been declared that the doctrine of "ancient lights" was adopted as a part of the common law. See Clawson v. Primrose, 4 Del. Ch. 643, which is discussed and questioned but not overruled by

Hulley v. Security Trust Co., 5 Del. Ch. 578.

¹ Parker v. Foote, 19 Wend. (N. Y.) 309; Doyle v. Lord, 64 N. Y. 432; Sutphen v. Therkelson, 38 N. J. Eq. 318, 323; Pierre v. Fernald, 26 Me. 436.

² Keats v. Hugo, 115 Mass. 204; Parker v. Foote, 19 Wend. (N. Y.), 309; Hayden v. Dutcher, 31 N. J. Eq. 217.

³ Keats v. Hugo, 115 Mass. 204, 215.

fere with the exercise of this legal right, even though the motive in making the erection be purely malicious.¹

§ 204. **Prescriptive Right to Air.** — The uniform rule in the United States, with the exception of Delaware, is that a prescriptive right to the flow of air, whether generally or in a defined channel or flue, can no more be acquired than can such an easement in a continuous flow of light.² The reasons are the same as to both light and air; and the two are generally treated together, as governed by precisely the same principles.³ The English courts, however, while adhering broadly to their doctrine of "ancient lights," and now being held to it by the statute above quoted, refuse to sustain prescriptive easements in the access and flow of air, except in cases where its enjoyment has been continued for twenty years or more through a definite flue or channel. They have sustained such an easement, for example, in the right of plaintiff to ventilate a cellar through a hole bored through the rock so as to connect with a well in defendant's land;⁴ but have denied that a prescriptive right could be acquired to have the air flow generally into one's back yard,⁵ or over neighboring land so as to prevent a chimney from smoking,⁶ or for the purpose of running a windmill.⁷

§ 205. **Prospect or View.** — Although they differ so radically in regard to the methods of creating easements in light and air, yet the courts on both sides of the Atlantic agree that the only way in which can be acquired merely the right to an unobstructed view or prospect, — being as it is only a matter of pleasure or delight as distinguished from the enjoyment of light, or air, or both, which are so often necessities,

¹ *Tinker v. Forbes*, 136 Ill. 221; *Levy v. Brothers*, 4 N. Y. Misc. 48; *Letts v. Kessler*, 7 Ohio Cir. Ct. 108. But it has been held, in a few cases, that where a high board fence or other obstruction is erected solely from malicious motives, and with no purpose other than to injure one's neighbor, an injunction against it will be granted by a court of equity. *Kirkwood v. Finegan*, 95 Mich. 543; *Peck v. Roe*, 110 Mich. 52; *Flaherty v. Moran*, 81 Mich. 52; *Kessler v. Letts*, 7 Ohio Cir. Ct. 108.

² *Keats v. Hugo*, 115 Mass. 204; *Christ Church v. Lavezzolo*, 156 Mass. 89; *Parker v. Foote*, 19 Wend. (N. Y.)

309; *Tunstall v. Christian*, 80 Va. 1; *Sutphen v. Therkelson*, 38 N. J. Eq. 318.

³ *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Keats v. Hugo*, 115 Mass. 204, 215.

⁴ *Bass v. Gregory*, L. R. 25, Q. B. Div. 481; *Dent v. Auction Mart Co.*, 2 Eq. 238.

⁵ *Chastey v. Ackland* (1895), 2 Ch. 389; *Harris v. DePinna*, L. R. 33 Ch. Div. 238.

⁶ *Bryant v. Lefever*, L. R. 4 C. P. Div. 172, 179, 181.

⁷ *Webb v. Bird*, 10 C. B. N. S. 268, 13 C. B. N. S. 841.

—is by express grant or covenant.¹ It can not be gained by implied grant or prescription. It follows that, in the absence of such express contract to the contrary, one may build upon his own land, so as to obstruct his neighbor's view of a highway, the sea, or a landscape; or so as to partially shut off his signs or wares from public view.² But when an express covenant prohibiting such an interference has been entered into in the deed between the vendor and vendee of a parcel of land, it will be enforced by injunction in equity in favor of him for whose benefit it was made, even though he was not a party to the contract.³

Rights to Lateral and Subjacent Support of Soil and Buildings.

§ 206. **Forms of these Rights to be examined.** — Those servitudes which exist by nature, and therefore do not require any act or convention of the parties for their creation, have been heretofore frequently illustrated by rights to the support of land in its natural condition and to the flow of water in its customary channels. Similar privileges are frequently created by agreement or conduct of the parties, and then usually come into being as common-law easements. Such are rights to lateral or subjacent support of buildings or walls, and to the constant or peculiar flow of artificial streams. These matters are also regulated, to quite an extent, by statutes; and thus servitudes of this character are brought into existence by operation of law. The rights, immunities, and duties peculiar to the support of lands and buildings are the first group of such easements and servitudes to be examined. And they will be discussed in the following order, namely: lateral support of land or soil, lateral support of buildings (exclusive of special questions of wall rights which will be the subject of a subsequent section), subjacent support of land or soil, subjacent support of buildings.

§ 207. **Lateral Support of Land or Soil.** — Upon the principle *sic utere tuo ut alienum non lædas*, there exists by nature

¹ Aldred's Case, 9 Coke, 57 b; Atty.-Gen. v. Doughty, 2 Ves. Sr. 453; Dalton v. Angus, L. R. 6 App. Cas. 740, 824; Parker v. Foote, 19 Wend. (N. Y.) 309; Harwood v. Tompkins, 24 N. J. L. 425; Lyon v. McDonald, 78 Tex. 71;

Bowden v. Lewis, 13 R. I. 189; Tud. Lead. Cas. R. P. 123.

² Ibid.; Butt v. Imperial Gas Co., L. R. 2 Ch. 158; Smith v. Owen, 35 N. J. Eq. 317.

³ Gibert v. Peteler, 38 N. Y. 165.

the right of every landowner to have his soil supported laterally, in its natural state, by the soil or structure of the neighboring proprietor.¹ When, therefore, one makes an excavation upon his own land, in such a manner that the sand, clay, or other material of the adjoining land will fall into the pit or be disturbed if not artificially supported, and there is no special contract or statute authorizing him to so dig, he must shore up or otherwise support the other's soil, so as to retain it in its natural condition; or he will be liable in damages for the resulting injury.² And this is true regardless of the location, contour, or constituent materials of the neighboring land, in so far as these exist in a state of nature. Thus, the lower owner upon a hillside must support the soil of the upper owner, to as great an extent as is necessary to retain it in its natural and undisturbed condition. And, whether the properties be on a hill or a plain, the amount of such support required will depend, of course, upon the quality of the soil, — grading from nothing or almost nothing in rocky sections to a heavy burden in places where the soil is sandy or from any other cause readily movable. This right to the lateral support of natural soil is absolute, unless restricted by contract or statute; and when it is interfered with, all that its owner needs to prove, in order to establish a cause of action, is that he has suffered damage because of such disturbance. He need not show that the excavation which caused his soil to cave in was done in any careless, negligent, or unskilful manner.³

There is a conflict of authority as to whether or not this right to lateral support of soil exists against a city, town, or other municipality, in favor of land abutting upon a public street or highway. While in some of the United States it is held to exist against such public entities as well as against private owners,⁴ yet in England, and probably by the weight

¹ *Humphries v. Brogden*, 12 Q. B. 739, 743; *Lasala v. Holbrook*, 4 Paige (N. Y.), 169; *Hay v. Cohoes*, 2 N. Y. 159; *Radcliff v. Mayor*, 4 N. Y. 195; *McGettigan v. Potts*, 149 Pa. St. 155; *Schultz v. Byers*, 53 N. J. L. 442; *Gilmore v. Driscoll*, 122 Mass. 199; *Moody v. McClelland*, 39 Ala. 45; *Moellering v. Evans*, 121 Ind. 195; *Stearns v. Richmond*, 88 Va. 992.

² *Ibid.*; Article in 1 Amer. Law Rev. 1.

³ *Transportation Company v. Chicago*, 99 U. S. 635; *Gilmore v. Driscoll*, 122 Mass. 199; *McGuire v. Grant*, 25 N. J. L. 356; *Green v. Berge*, 105 Cal. 52; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465.

⁴ *Dyer v. St. Paul*, 27 Minn. 457; *Burr v. Leicester*, 121 Mass. 241; *Cabot v. Kingman*, 166 Mass. 403; *Stearns v. Richmond*, 88 Va. 992; *Keating v. Cincinnati*, 38 Ohio St. 141.

of authority in this country, the principle is maintained that a municipality, acting under proper legislative authority, is not liable to a landowner for the falling away of his soil caused solely by the grading or alteration of a street in a proper and careful manner.¹

§ 208. **Lateral Support of Buildings.** — The natural right to lateral support does not extend to any buildings or artificial structures which may be erected on the land. And, therefore, if one place his house upon the verge of his lot, he does not thereby have the right to insist that it also shall have the support of his neighbor's soil.² If in digging upon his own property the adjacent proprietor do nothing that would interfere with the land in question in its natural state, i. e., if he excavate so that such land would remain intact if it were not loaded with the additional weight of the building, then any injury thus occasioned is ordinarily *damnum absque injuria*.³ The process of excavating must, of course, be carried on with sufficient care and skill so as not to injure the adjoining structure by the manner in which it is done, even though the mere existence of the hole thus dug would have occasioned no damage to the neighboring land in its natural state.⁴ But this requirement emerges, not from the mere right of lateral support, but from the fact that negligent, unskilful, or improper digging or blasting may in itself result in a nuisance or a trespass upon the adjacent land.

¹ Boulton v. Crowther, 2 B. & C. 703; Transportation Company v. Chicago, 99 U. S. 635; Radcliff v. Mayor, 4 N. Y. 195; Folmsbee v. City of Amsterdam, 142 N. Y. 118; White v. Nassau Trust Co., 168 N. Y. 149; Callender v. Marsh, 1 Pick. (Mass.) 418; Fellowes v. New Haven, 44 Conn. 240; O'Connor v. Pittsburgh, 18 Pa. St. 187; Quincy v. Jones, 76 Ill. 231; Aurora v. Fox, 78 Ind. 1; § 179, *supra*. In some of the United States there are statutes which require cities and other municipalities to make compensation for injuries caused to abutting land by the grading, altering, or improving of streets and highways. See O'Brien v. Philadelphia, 150 Pa. St. 589; Elgin v. Eaton, 83 Ill. 535.

² Angus v. Dalton, L. R. 6 App. Cas. 740; Partridge v. Scott, 3 M. & W. 220; Wyatt v. Harrison, 3 Barn. & Ad. 871; Transportation Co. v. Chicago, 99

U. S. 635; Dorrity v. Rapp, 72 N. Y. 307; White v. Nassau Trust Co., 168 N. Y. 149; Finegan v. Eckerson, 32 N. Y. App. Div. 233, 235; Schultz v. Byers, 53 N. J. L. 442; McGettigan v. Potts, 149 Pa. St. 155; Gilmore v. Driscoll, 122 Mass. 199; Gildersleeve v. Hammond, 109 Mich. 408; Quincy v. Jones, 76 Ill. 231.

³ Thurston v. Hancock, 12 Mass. 220; Gilmore v. Driscoll, 122 Mass. 199; Lasala v. Holbrook, 4 Paige (N. Y.), 169; Austin v. H. R. R. Co., 25 N. Y. 334, 346; Smith v. Thackerah, 1 C. P. 564; Backhouse v. Bonomi, 9 H. L. Cas. 503.

⁴ Austin v. H. R. R. Co., 25 N. Y. 334, 346; Radcliff v. Mayor, 4 N. Y. 195; McGuire v. Grant, 25 N. J. L. 356; Gilmore v. Driscoll, 122 Mass. 199, 201; Tunstall v. Christian, 80 Va. 1; Charles v. Rankin, 22 Mo. 566; Winn v. Abeles, 35 Kan. 85.

It is now held by many courts, also, that the exercise of proper care and diligence, on the part of him who intends to dig in such a manner that a building on the land of another may be thereby damaged, requires him to notify the owner of such building, or to see to it that he has knowledge of the proposed excavation.¹ "It is more than a neighborly act," says a New Jersey court, "to give such notice, because it involves the right of one man to assert his right, regardless of the injury he may cause his neighbor without such warning."² But some leading tribunals have denied that, in the absence of statutory requirement, there exists any such duty on the part of a careful excavator.³ And, as already indicated, it is nowhere required that formal notice be given to a neighboring owner who already has knowledge or reasonable notice of the intended improvement.⁴

A right to the lateral support of a house or other artificial structure may be acquired, as an easement, by any of the forms of grant.⁵ Thus, it may be directly created and conveyed by deed, or reserved in the conveyance of the contiguous land. And when the owner of two houses so built together as to require mutual support conveys one of them, or otherwise separates the ownerships of them, the right of each house to continue to be supported by the other may readily arise by implied grant.⁶

It is thoroughly settled law in England that a properly constructed ancient building, i. e., a building which has stood in the same position for twenty years or more, may acquire by prescription the right to continuous support by the land of the adjacent proprietor in its natural condition, or if that be removed, an adequate lateral support supplied by such adjacent owner.⁷

¹ *Massey v. Goyder*, 4 Carr. & P. 161; *Dodd v. Holme*, 1 Adol. & El. 493; *Schultz v. Byers*, 53 N. J. L. 442; *Larson v. Met. St. R. Co.*, 110 Mo. 234; *Shafer v. Wilson*, 44 Md. 268; *Clemens v. Speed*, 93 Ky. 284; *First Nat. Bk. v. Villegra*, 92 Cal. 96.

² *Schultz v. Byers*, 53 N. J. L. 442, 446.

³ See *Dorrity v. Rapp*, 72 N. Y. 307; *White v. Nassau Trust Co.*, 168 N. Y. 149; *Gildersleeve v. Hammond*, 109 Mich. 408; *Obert v. Dunn*, 140 Mo. 476.

⁴ *Dodd v. Holme*, 1 Adol. & El. 493; *Schultz v. Byers*, 53 N. J. L. 442;

Dorrity v. Rapp, 72 N. Y. 307; *Gildersleeve v. Hammond*, 109 Mich. 408; *Leavenworth Lodge v. Byers*, 54 Kan. 323; *Moody v. McClelland*, 39 Ala. 45.

⁵ *North Eastern R. Co. v. Elliott*, 1 J. & H. 145; *Siddons v. Short*, L. R. 2 C. P. Div. 572; *Richards v. Rose*, 9 Exch. 218; *Lampman v. Milks*, 21 N. Y. 505, 514; *Tunstall v. Christian*, 80 Va. 1.

⁶ *Richards v. Rose*, 9 Exch. 218; *Lemaitre v. Davis*, L. R. 19 Ch. Div. 281; *Fox v. Clarke*, 9 Q. B. 565. See *Snow v. Pulitzer*, 142 N. Y. 263.

⁷ *Angus v. Dalton*, 6 App. Cas. 740;

It is also held in that country that contiguous buildings belonging to different owners have by prescription a right of support from each other, after twenty years of uninterrupted, adverse enjoyment.¹ These rules exist there in analogy to the English doctrine of "ancient lights."

There are some strong *dicta* in this country also, and a few early decisions, which uphold the principle that rights of lateral support may be gained by prescription.² Thus, in the early New York case of *Lasala v. Holbrook*,³ Chancellor Walworth said: "There is another class of cases, however, where the owner of a building on the adjacent lot is entitled to full protection against the consequences of any new excavation or alteration of the premises intended to be improved, by which he may be in any way prejudiced. These are ancient buildings, or those which have been erected upon ancient foundations, and which, by prescription, are entitled to the special privilege of being exempted from the consequences of the spirit of reform operating upon the owners of the adjacent lots, and also those which have been granted in their present situation by the owners of such adjacent lots, or by those under whom they have derived their title." But, in harmony with the general American doctrine that a prescriptive title must rest upon an adverse user of such a nature as to give a cause of action in favor of the person against whom the acts of enjoyment are performed, in several important and carefully considered cases of more recent date the English rule upon this matter has been repudiated; and it has been held that, when there is no actual adverse use or occupancy of any part of the land of the contiguous owner, the right to lateral support of a building or other artificial erection can not be acquired by prescription.⁴ And it is safe to say that this is now the generally accepted rule on this side of the Atlantic.⁵

Dodd v. Holme, 1 Adol. & El. 493, 505; *Solomon v. Vintner's Co.*, 4 H. & N. 585; *Backhouse v. Bonomi*, 9 H. L. Cas. 503.

¹ *Lemaitre v. Davis*, L. R. 19 Ch. Div. 281; *Solomon v. Vintner's Co.*, 4 H. & N. 585; *Brown v. Windsor*, 1 Cr. & J. 20. See *Adams v. Marshall*, 138 Mass. 228.

² *Lasala v. Holbrook*, 4 Paige (N. Y.), 169, 173; *Stimmel v. Brown*, 7 Houst. (Del.) 219; *Stevenson v. Wallace*, 27 Gratt. (Va.) 77; *Richart v. Scott*, 7

Watts (Pa.), 460; *Aston v. Nolan*, 63 Cal. 269; *City of Quincy v. Jones*, 76 Ill. 231.

³ 4 Paige, 169, 173.

⁴ *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Tunstall v. Christian*, 80 Va. 1; *Handhan v. McManus*, 42 Mo. App. 551, affirmed in 100 Mo. 124; *Sullivan v. Zeiner*, 98 Cal. 346; *Clemens v. Speed*, 93 Ky. 284; *Richart v. Scott*, 7 *Watts* (Pa.), 460; *Mitchell v. Mayor*, 49 Ga. 19.

⁵ In *Gilmore v. Driscoll*, 122 Mass. 199, 207, Chief Justice Gray said: "It

In some of the states of this country, positive statutes regulate such rights and burdens as are above discussed in this section, especially in regard to houses and building operations in large cities.¹ (a)

§ 209. **Subjacent Support of Land or Soil.** — Where different *strata* of earth or soil, one beneath the other, are owned by different persons, and there is no contract nor statute which affects their interests, the owner of the upper *stratum* has an absolute right to have his land supported in its natural condition by the *stratum* below.² And this right exists whether the

(a) For those parts of the city of New York which before the consolidation of Jan. 1, 1898, constituted the cities of New York and Brooklyn, it is provided by statute that, when an excavation is to be carried more than ten feet below the curb, the party making it must support and maintain uninjured, contiguous walls and buildings, if he be given the necessary license to enter upon the lands of their owners for that purpose; but, when an excavation is not to be carried more than ten feet below the curb, the owners of adjoining walls and buildings must support and preserve them at their own expense. N. Y. Laws 1885, ch. 456; 1887, ch. 566, § 3; 1892, ch. 275, § 9; 1855, ch. 6; 1888, ch. 583. Under these statutes, when the excavation is to be made more than ten feet below the curb, the person making it must request permission from the neighboring proprietors to enter upon their lands to an extent sufficient to enable him to shore up and protect their walls; and it is no defence, in an action against him for damages for injury occasioned by his excavation, that the plaintiff did not proffer such a license without being asked for the same. *Dorrity v. Rapp*, 72 N. Y. 307; *Cohen v. Simmons*, 21 N. Y. Supp. 385. See also *McKenzie v. McKenzie*, 141 N. Y. 6; *Ketchum v. Newman*, 116 N. Y. 422. Unless full, explicit license to enter on the land is given when so requested, he who makes the excavation more than ten feet below the curb is not bound to protect the adjoining wall or building. *Sherwood v. Seaman*, 2 Bosw. 127; *Johnson v. Oppenheim*, 55 N. Y. 280. This statute does not apply to the foundations of a stoop; and therefore questions of liability for injuries to stoops arising from such digging are governed by the rules of the common law. *Berry v. Todd*, 14 Daly, 450.

is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land which can be seen or known, or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former."

¹ 1 Stim. Amer. Stat. L. §§ 1170, 2251.

² *Humphries v. Brogden*, 12 Q. B.

739; *Love v. Bell*, L. R. 9 App. Cas. 286; *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Pringle v. Vesta Coal Co.*, 172 Pa. St. 438; *Robertson v. Coal Co.*, 172 Pa. St. 566; *Williams v. Hay*, 120 Pa. St. 485; *Marvin v. Brewster I. M. Co.*, 55 N. Y. 538, 556; *N. J. Zinc Co. v. N. J. Franklinitite Co.*, 13 N. J. Eq. 322; *Erickson v. Mich. L. & T. Co.*, 50 Mich. 604; *Burgner v. Humphrey*, 41 Ohio St. 340; *Mickle v. Douglas*, 75 Iowa, 78; *Yandes v. Wright*, 66 Ind. 319.

lower property consists of rock, clay, minerals, or other stable substances, or of easily movable materials such as quicksand;¹ and whether one of the *strata* is surface land, or both are some distance below the surface.² The lower owner must not remove his soil, by digging it away, or even by pumping it out, as, for example, when it is quicksand, in such a manner as to cause a subsidence of the land above.³

Questions relating to subjacent support of soil are most numerous and important in mining localities. The natural right to such support does not prevent the owner of subsurface mineral property from utilizing it by removing the minerals; but it requires him, in the process of mining, to leave, or in some manner to supply and maintain, an adequate protection against the subsidence of the land of the upper proprietor.⁴ When, therefore, the owner of the entire interest in a tract of land sells the lower mineral portion and keeps the surface, he impliedly retains also the natural servitude in the support of his surface soil; and, when he conveys the upper *stratum* and retains the lower, he impliedly grants also the right against himself to have the upper *stratum* vertically supported in its natural state.⁵ The owner of the mineral property, while required to endure this servitude of support, has a reciprocal right to a way through the upper *strata* to the surface. He may use the surface land, as by constructing and working shafts and roads, to as great an extent as is reasonably necessary for the proper enjoyment of his own property, provided he thereby injures the other proprietor as little as possible.⁶ Such rights frequently arise in substantially the same manner and with practically the same incidents as ways of necessity.

§ 210. **Subjacent Support of Buildings.**—Beyond the rights and burdens already explained, as existing between different owners of different *strata* of soil, the common law does not

¹ Cabot v. Kingman, 166 Mass. 403.

² Robertson v. Coal Co., 172 Pa. St. 566; Mundy v. Duke of Rutland, L. R. 23 Ch. Div. 81, 89.

³ Ibid.; Pringle v. Vesta Coal Co., 172 Pa. St. 438. See Forbell v. City of New York, 164 N. Y. 522; Reisert v. City of New York, 174 N. Y. 196; Popplewell v. Modkinson, 4 Exch. 248, 251; Elliott v. N. E. R. Co., 10 H. L. Cas. 333.

⁴ Humphries v. Brogden, 12 Q. B. 739, 745; Wilson v. Waddell, L. R. 2

App. Cas. 95; Backhouse v. Bonomi, 9 H. L. Cas. 503; Williams v. Hay, 120 Pa. St. 485; Carlin v. Chappel, 101 Pa. St. 348; Jones v. Wagner, 66 Pa. St. 429.

⁵ Humphries v. Brogden, 12 Q. B. 739, 746; Harris v. Ryding, 5 M. & W. 60; Pringle v. Vesta Coal Co., 172 Pa. St. 438, 442; Livingston v. Moingona Coal Co., 49 Iowa, 369.

⁶ Pringle v. Vesta Coal Co., 172 Pa. St. 438.

ordinarily go in the creation of natural servitudes of vertical support. Other rights and privileges of a similar character arise if at all from express or implied grant or from prescription, and are technical common-law easements. Such is the right to burden the surface *stratum* with buildings and insist that the owner of the portion of earth lower down, such as the owner of mines below, shall sustain the weight of the building in addition to that of the upper soil in its natural condition. There is very little positive adjudication upon this branch of the law of subjacent support. But the above statements are clear in principle, and harmonize with the cases actually decided and with the opinions and utterances of eminent judges and jurists.¹ The ordinary statement of such writers, with regard to separate ownerships of higher and lower properties, is that the upper one has a right by nature to be supported *in its natural condition* by the lower *stratum*.²

There is more positive adjudication as to the rights and duties of separate owners of different stories or flats of a house. And it is settled that neither can remove, destroy, or alter his portion in such a manner as to work an injury to any other owner;³ that the owner of an upper story is entitled to vertical support from the lower parts of the building and to share in such lateral support as the building may of right enjoy;⁴ but that ordinarily neither of such owners can compel any of the others to make repairs or to contribute towards the making of the same.⁵

Party-wall Rights, and other Similar Easements and Servitudes.

§ 211. **Different Kinds of Wall Rights.**—The various forms of expressions employed to denote wall rights and privileges are frequently used, even by lawyers and judges, in loose and inaccurate senses; and the term “party-wall right” has been made

¹ *Humphries v. Brogden*, 12 Q. B. 739, 745; *Dalton v. Angus*, L. R. 6 App. Cas. 740; *Pierce v. Dyer*, 106 Mass. 374; *Pringle v. Vesta Coal Co.*, 172 Pa. St. 438; *Dorrity v. Rapp*, 72 N. Y. 307.

² *Dalton v. Angus*, L. R. 6 App. Cas. 740; *Lasala v. Holbrook*, 4 Paige (N. Y.), 169; *Pierce v. Dyer*, 109 Mass. 374.

³ *Harris v. Ryding*, 5 M. & W. 60;

Dalton v. Angus, L. R. 6 App. Cas. 740; *Graves v. Berdan*, 26 N. Y. 498.

⁴ *Harris v. Ryding*, 5 M. & W. 60; *Dalton v. Angus*, L. R. 6 App. Cas. 740; *Birmingham v. Allen*, L. R. 6 Ch. Div. 292; *Richards v. Rose*, 9 Exch. 218; *Graves v. Berdan*, 26 N. Y. 498; *Connel v. Kibbe*, 33 Ill. 175; *Rhodes v. McCormick*, 4 Iowa, 368.

⁵ *Pierce v. Dyer*, 109 Mass. 374, 376; *Ottumwa Lodge v. Lewis*, 34 Iowa, 67.

to describe all sorts of easements and servitudes found in connection with structures erected upon division lines. But, from the more recent and accurate use of words in this connection, we may observe four distinct, important species of wall rights. It is important carefully to distinguish these and observe the chief characteristics of each, especially as they come into play in erecting, altering, preserving, or destroying buildings in large cities. They are the rights which arise and exist in connection with, *a*, an independent wall, *b*, a common wall, *c*, a mere easement of support in a wall which belongs entirely to another, and *d*, a party wall.¹

§ 212. *a. Independent Wall.*—An independent wall, as its name indicates, is owned separately and distinctly by the proprietor of the land on which it stands. Such are ordinarily the front and rear walls of houses, and the side walls which are erected wholly on the lot upon which the house stands and without any connection with any other structures. About the only form of easement incident to this kind of wall is that of support, which arises when a house is so constructed that its side wall, although in form entirely independent, has come to depend more or less on the wall of an adjacent building, or when two houses are so constructed that their adjoining distinct walls mutually support each other.²

§ 213. *b. Common Wall.*—By this is meant a wall of which the two adjoining owners are tenants in common (or possibly joint tenants), i. e., each owns an undivided interest in the entire structure; and no part of it is owned independently and absolutely by either of them.³ This is the kind of structure which a wall erected partly on one man's land and partly on another's may become when no statute, nor contract, nor prescriptive right makes its nature different.⁴ Yet most walls so built are affected by some contract, express or implied, or governed by positive statutory enactment. And the results are that they are generally not common walls, but erections of

¹ See *Watson v. Gray*, L. R. 14 Ch. Div. 192, 194.

² *Richards v. Rose*, 9 Exch. 218; *Lemaitre v. Davis*, L. R. 19 Ch. Div. 281; *Webster v. Stevens*, 5 Duer (N.Y.), 553; *Eno v. Del. Vecchio*, 4 Duer (N. Y.), 53; *Solomon v. Vintner's Co.*, 4 H. & N. 585. See *Peyton v. London*, 9 B. & C. 725; *Adams v. Marshall*, 138 Mass. 228.

³ *Wiltshire v. Sidford*, 1 Mann. & Ry. 404; *Cubitt v. Porter*, 8 B. & C. 257, 165; *Watson v. Gray*, L. R. 14 Ch. Div. 192, 194.

⁴ *Backhouse v. Bonomi*, 9 H. L. Cas. 503; *List v. Hornbrook*, 2 W. Va. 340, 345; *Gilmore v. Driscoll*, 122 Mass. 199, 207; *Quinn v. Morse*, 130 Mass. 317; *Whiting v. Gaylord*, 66 Conn. 337.

some other nature, and most frequently party walls. Indeed, in the absence of evidence to the contrary, a wall thus built upon two lots is ordinarily presumed to be a party wall, and is governed by the rules of law applicable to such a structure.¹ Those rules, as hereafter explained, have necessarily to deal with easements and servitudes. But, in connection with a mere common wall, there are usually no such rights or burdens, except those which happen to be made by special contract between the owners. This last named form of wall is, therefore, described here simply for the sake of completeness.

§ 214. *c. Right of Support in a Wall which belongs entirely to Another.* — This may be a privilege of supporting a wall of a house, as above explained.² But, in connection with building operations in cities, it is most frequently in the form of an easement in the support of the beams or joists of a house in the wall upon the adjoining lot. Thus, A, intending to erect a house upon his own lot and finding that B, the owner of the contiguous land, has already built up close to the dividing line between the two properties, frequently purchases from B the right to support the beams of his contemplated structure in the wall already existing upon B's lot. He then erects his building without constructing any new wall upon that side, and depends, for the security of his house, upon the validity of the contract which he has made with B. Such a right, being a common-law easement, may be acquired by any form of grant, or by prescription. But he who depends for the safety of his building on a privilege of this nature has upon him, in any litigation concerning it, the burden of clearly establishing its existence.³ As a rule, it is the least satisfactory, for its owner, of all the kinds of wall easements and servitudes.

§ 215. *d. Party Wall — Definition — General Nature.* — A party wall is a division wall erected on or near the line between two pieces of land belonging to different owners, and so constructed that each owns absolutely that portion of it which stands upon his own land and also a right of support in the

¹ *Cubitt v. Porter*, 8 B. & C. 257; *Schile v. Brokhahus*, 80 N. Y. 614; *Campbell v. Mesier*, 4 Johns, Ch. (N. Y.) 334; *Weyman a. Ringold*, 1 Bradf. (N. Y.) 40; *Warner v. Southworth*, 6 Conn. 471; *Weill v. Baker*, 39 La. Ann. 1102.

² § 212, *supra*.

³ *Hodgkins v. Farrington*, 150 Mass. 19; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Pearsall v. Westcott*, 30 N. Y. App. Div. 99, 102; *Spero v. Schultz*, 14 N. Y. App. Div. 423; *Moore v. Rayner*, 58 Md. 411; *Whiting v. Gaylord*, 66 Conn. 337.

entire wall. Thus, if A and B owning adjacent lots of land build a party wall twelve inches thick standing one-half on A's lot and one-half on B's, A owns all the corporeal substance of the six inches of the wall on his land, the right to compel B to retain the other six inches for its support and the right to make such use of the entire structure (as by sticking beams into it and resting joists upon it) as may be reasonably required in the proper construction and preservation of the house on A's property. And B has the ownership of the six inches on his lot and the same kinds of rights against A's half of the wall. While, then, there is no co-ownership of the tangible materials of which the wall is composed, there are cross easements or servitudes in the mutual rights to support of each half of the wall by the other half and in the beam and building rights required for the respective houses.¹ It is not necessary, however, that a party wall should stand with one-half of it upon each of the adjoining parcels of land. The greater portion, or even all of it, may be on one side of the dividing line; or that line may run diagonally through the wall.² The incorporeal rights and privileges are the same, in all such cases, and the only distinctions are as to the quantities of the corporeal substance which belong to each proprietor. Each one owns the bricks and mortar, or other substantial materials, upon his side of the division line, even though they may include very little, or the most, or the whole of the wall. But he holds them subject to the support, beam, and building rights of his neighbor, as above explained. In some cases, it has been shown that the structure in question stood entirely on one man's land, and even some little distance away from the

¹ "The adjoining owners are not joint tenants or tenants in common of the party wall. Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other, to the end that it may afford a support to the wall and buildings of such other." *Bouvier's Law Dict. "Party Wall."* *Hoffman v. Kuhn*, 57 Miss. 746; *Odd Fellows v. Hegele*, 32 Pac. Rep. 681 (Oreg.); *Partridge v. Gilbert*, 15 N. Y. 601, 614; *Brooks v. Curtis*, 50 N. Y. 639; *Negus*

v. Becker, 143 N. Y. 303; *Nat. Com. Bk. v. Gray*, 71 Hun (N. Y.), 295; *Normille v. Gill*, 159 Mass. 427; *Traute v. White*, 46 N. J. Eq. 437; *Milne's Appeal*, 81 Pa. St. 54; *Gibson v. Holden*, 115 Ill. 199; *Graves v. Smith*, 87 Ala. 450.

² *Pearsall v. Westcott*, 30 N. Y. App. Div. 99, 102; *Fettretch v. Leamy*, 9 Bosw. (N. Y.) 510, 530; *McVey v. Durkin*, 136 Pa. St. 418; *Tate v. Fratt*, 112 Cal. 613; *Zeininger v. Schnitzler*, 48 Kan. 63; *Barry v. Edlavitch*, 84 Md. 98; *Marion v. Johnson*, 23 La. Ann. 597.

lot of the other; and yet such other landowner has been held to have in it all the rights and privileges appertaining to a party wall.¹

The expression "party wall" does not necessarily imply a solid structure.² There is, for example, no rule of law which prevents one who is building such a wall, under an agreement with his neighbor that the latter will pay for half of it, from leaving in it chimney flues. And when it is the general custom of the place to put flues in party walls, such custom may be invoked to show that the wall was built in accordance with the understanding and intention of the contracting parties.³ But the rights and privileges to which such a structure gives rise are limited in extent, and are ordinarily confined to the purposes of mutual support.⁴ Hence one lot owner can not, without the consent of the other, erect the wall with openings in it, such as windows or doors, nor place or maintain them in it after its erection,⁵ nor construct or use it for any purpose other than those of a division wall for the support and preservation of the two houses and as an external wall for each.⁶

§ 216. **Creation of Party-wall Rights.** — In some states, party walls and their accompanying rights and duties are specially provided for by statutes. And, in all jurisdictions, they may

¹ Pearsall v. Westcott, 30 N. Y. App. Div. 99; Tate v. Fratt, 112 Cal. 613; Dorsey v. Habersack, 84 Md. 98; McVey v. Durkin, 136 Pa. St. 418.

² Hammann v. Jordan, 129 N. Y. 61; Fetterich v. Leamy, 9 Bosw. (N. Y.) 510, 525; Ingals v. Plamondon, 75 Ill. 118.

³ Hammann v. Jordan, 129 N. Y. 61; De Baun v. Moore, 32 N. Y. App. Div. 397, 398; Batt v. Kelly, 75 N. Y. App. Div. 321.

⁴ "Various reasons of inconvenience or peril have been assigned for the doctrine, but they are all referable, we think, to the general doctrine that the easement is only a limited one, and it is not to be extended so as to include rights and privileges not belonging to the character of a wall which is to be owned in common, (and in which the rights of each owner are equal." Normille v. Gill, 159 Mass. 427; Fetterich v. Leamy, 9 Bosw. (N. Y.) 510; Harber v. Evans, 101 Mo. 661; Sullivan v.

Graffort, 35 Iowa, 531; Dunscomb v. Randolph, 107 Tenn. 89.

⁵ De Baun v. Moore, 22 N. Y. App. Div. 485; also cases cited *supra*, last six notes, and especially Nat. Com. Bk. v. Gray, 71 Hun (N. Y.), 295; Brooks v. Curtis, 50 N. Y. 639; Normille v. Gill, 159 Mass. 427; Wells v. Garbutt, 132 N. Y. 430; Paine v. Chandler, 134 N. Y. 385; Vollmer's Appeal, 61 Pa. St. 118; Traute v. White, 46 N. J. Eq. 437.

⁶ Normille v. Gill, 159 Mass. 427; Wistar v. Amer. Bap. Soc., 2 W. N. C. (Pa.) 333; Dauenhauer v. Devine, 51 Tex. 480; Dawson v. Kemper, 11 Ohio Cir. Ct. 180, 181.

But, of course, a contract, expressly made by the parties or implied from their conduct, may vary these principles, and enable one of the owners of a party wall to put windows in it or otherwise vary its form or use. Hammann v. Jordan, 129 N. Y. 61; Weigmann v. Jones, 163 Pa. St. 330; Grimley v. Davidson, 35 Ill. App. 31; Barry v. Edlavitch, 84 Md. 95.

arise from express contract or covenant, including reservation of such rights in the conveyance of corporeal property, or from implied grant or contract, or from prescription.

The general purport of statutes, which authorize the erection and maintenance of such walls, is that, in a city or town, one who builds a wall of brick or stone contiguous to the vacant lot of his neighbor may place one-half of it upon such neighbor's land, and that, when the latter uses the wall, which he may do at any time, he shall contribute one-half of the cost of its construction. Such enactments, varying considerably in details, are found, and sustained by the courts as valid forms of exercise of the police power, in the District of Columbia, Iowa, Louisiana, Mississippi, Pennsylvania, and South Carolina.¹ In other states, such as Massachusetts and New Jersey, such legislation has been declared to be unconstitutional and void, as an attempt to authorize an illegal taking of private property for private purposes.² It would seem that, in the absence of positive constitutional authority, statutes of such a nature ought not to be sustained.

One of the most common methods of bringing party walls into existence is as the result of express grant or covenant entered into by the owners of the two contiguous lots of land.³

Many come into being, also, by virtue of contracts implied by the law from the conduct and transactions of the owners of the parcels of land affected. Probably the most prevalent illustration of this latter method of creating them is found in that large class of cases in which one person has built two or more connected houses in a row, with single walls (ordinarily eight or twelve inches thick) between them, and has subsequently sold them and the lots of land on which they stand respectively to different purchasers, or has sold one or more and retained the adjacent ones. Unless

¹ 1 Stim. Amer. Stat. L. §§ 2170-2177; Jones, Easement, §§ 635-640.

² "It seems to me that where my neighbor takes exclusive possession and occupation of my land by covering it with a solid wall of masonry many feet high, he 'takes' it from me in the most thorough and effective manner, although the legal title remains in me. I do not understand that the legal title is at all involved in an unlawful 'taking' of land, but that it is a question rather of practical dominion over, and

the right to use it at the owner's free will and pleasure, so that he does not injure his neighbor or the public." *Traute v. White*, 46 N. J. Eq. 437, 440; *Williams v. Jewett*, 139 Mass. 29. But see *Evans v. Jayne*, 23 Pa. St. 34, 36.

³ *King v. Wight*, 155 Mass. 444; *Garmire v. Willy*, 36 Neb. 340; *Brooks v. Curtis*, 50 N. Y. 639; *Keteltas v. Penfold*, 4 E. D. Smith (N. Y.), 122; *Gibson v. Holden*, 115 Ill. 192; *Duncan v. Rodecker*, 90 Wis. 1.

the deeds or other contracts between the parties expressly provides otherwise, such walls thus become party walls by implication of law, whether the dividing lines are described as running through the centres of such walls, or simply through such walls, or the descriptions of the lots are only by courses and distances or simply by designation of the buildings.¹ Each purchaser is presumed to have contracted with reference to the actual condition of the properties at the time, and to have taken his house and lot with all the benefits and burdens which apparently belonged to them. So, if one build a wall of his house partly upon land of his neighbor, and this without the consent of such neighbor, the latter may, at his election, treat the structure as a party wall, and, without paying for any portion of it, may use it as such. The one who constructed it is estopped by his location of it to deny that he intended to make it a party wall;² but the other, if he so elect, may refuse to treat it in that manner and compel its removal from his land.³ Again, when neighbors construct their houses at the same time and erect between them a single wall in and upon which each supports his building, it thereby becomes a party wall by implication.⁴ And, in general, whenever the owners of contiguous lots of land place a wall upon or near the boundary line between them and mutually use it for the support of the beams or joists or roofs of their buildings, and whenever two persons become separate owners of distinct houses so constructed with reference to some wall, and there is no positive contract between them to the contrary, the law presumes that the wall is a party wall.⁵

¹ *Richards v. Rose*, 9 Exch. 218; *Solomon v. Vintner's Co.*, 4 H. & N. 585, 586; *Eno v. Del Vecchio*, 4 Duer (N.Y.), 53; *Partridge v. Gilbert*, 15 N. Y. 601; *Brooks v. Curtis*, 50 N. Y. 639, 642; *Heartt v. Kruger*, 121 N. Y. 386; *Carlton v. Blake*, 152 Mass. 176; *Everett v. Edwards*, 149 Mass. 588; *Warfel v. Knott*, 128 Pa. St. 528; *Ingals v. Plamondon*, 75 Ill. 118; *Henry v. Koch*, 80 Ky. 391; *Heatt v. Morris*, 10 Ohio St. 523.

² *Heartt v. Kruger*, 121 N. Y. 386; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Lampman v. Milks*, 21 N. Y. 505, 507; *Henry v. Koch*, 80 Ky. 391. But he is not estopped to prevent the other from running the wall further back upon the lot. *Schmidt v. Lewis*, 63 N. J. Eq. 564.

³ *Sherred v. Cisco*, 4 Sand. (N. Y.) 480; *Potter v. White*, 6 Bosw. (N. Y.) 644; *Brown v. McKee*, 57 N. Y. 684; *Pile v. Pedrick*, 167 Pa. St. 296; *Houghton v. Mendenhall*, 50 Minn. 40; *Kells v. Helm*, 56 Miss. 700.

⁴ *Rindge v. Baker*, 57 N. Y. 209; *Huck v. Flentye*, 80 Ill. 258; *Miller v. Brown*, 33 Ohio St. 547; *Eckleman v. Miller*, 57 Ind. 88; *Wickersham v. Orr*, 9 Iowa, 253; *Rice v. Roberts*, 24 Wis. 461; *Hammond v. Schiff*, 100 N. C. 161.

⁵ "In the absence of evidence to the contrary a common wall between two adjoining estates is presumptively a party wall, either from an agreement to that effect or from its being built

Lastly, by prescription a division wall between buildings becomes a party wall after continuous adverse user as such for the full prescriptive period.¹ The burden of proof to show all the elements of such user rests strongly upon him who claims the party-wall rights. He must show, not only the proper method of enjoyment by himself, or by himself and his predecessor in title, but also the negative fact that no disability of the other party prevented the running of the full prescriptive period.²

§ 217. **Use of Party Walls.** — The principle of law which regulates the enjoyment of these structures and the rights connected with them is that they are for the common benefit and convenience of the adjoining properties; and the only restriction ordinarily imposed upon the right of one party to use them is that such use shall not be detrimental to the other owner.³ Accordingly, one alone, in the absence of restraining contract, may make the foundation deeper and stronger, or build the wall up higher, and both of these things he may do to the full thickness of the wall on both sides of the line between the adjoining lots;⁴ he may add thickness to it upon his side of that line, and so, by any or all of these means, he may make the wall suitable for a larger building, or for one different in other respects from that originally existing or contem-

upon the lines of such estates for that purpose by the respective owners. Of course, this presumption may be rebutted by evidence that the whole wall belongs to the owner of one estate, or by evidence that the owner of the two estates owns half of the wall in separate ownership, subject to no easement in favor of the other." Jones, *Ease*. § 644, citing *Cubitt v. Porter*, 8 B. & C. 257; *Matt v. Hawkins*, 5 Taunt. 20; *Watson v. Gray*, L. R. 14 Ch. Div. 192; *Schile v. Brokhahus*, 80 N. Y. 614; *Campbell v. Mesier*, 4 Johns. Ch. (N. Y.) 334; *Weyman v. Ringold*, 1 Brad. (N. Y.) 40; *Weill v. Baker*, 39 La. Ann. 1102; *Warner v. Southworth*, 6 Conn. 471; *Murly v. McDermott*, 8 Adol. & El. 138.

¹ *Schile v. Brokhahus*, 80 N. Y. 614; *Lewis v. Gollner*, 129 N. Y. 227; *Eno v. Del Vecchio*, 4 Duer (N. Y.), 53; *McVey v. Durkin*, 136 Pa. St. 418; *Hodgkin v. Farrington*, 150 Mass. 19;

Graves v. Smith, 87 Ala. 450; *Brown v. Werner*, 40 Md. 15.

² *Moore v. Raynor*, 58 Md. 411; *Spero v. Schultz*, 14 N. Y. App. Div. 423.

³ *Partridge v. Gilbert*, 15 N. Y. 601; *Mitnacht v. Slevin*, 142 N. Y. 638; *Myers v. Becker*, 143 N. Y. 303; *Carlton v. Blake*, 152 Mass. 176; *Lukens v. Lasker*, 202 Pa. St. 327; *Graves v. Smith*, 87 Ala. 450; *Tate v. Fratt*, 112 Cal. 613; *Andrae v. Haseltine*, 58 Wis. 395.

⁴ *Standard Bank v. Stokes*, L. R. 9 Ch. Div. 68; *Eno v. Del Vecchio*, 4 Duer (N. Y.), 53; *Brooks v. Curtis*, 50 N. Y. 639; *Negus v. Becker*, 143 N. Y. 303; *Carlton v. Blake*, 152 Mass. 176; *Everett v. Edwards*, 149 Mass. 588; *Matthews v. Dixey*, 149 Mass. 595; *Barry v. Edlavitch*, 84 Md. 95; *Dauenhauer v. Devine*, 51 Tex. 480; *Haiber v. Evans*, 101 Mo. 661.

plated.¹ When one of the owners has thus made additions to a party wall, the other may use it in its changed condition, without paying anything for the benefit of the improvements, unless he has bound himself by contract to make compensation for such advantages.² The substantial reason why one can not put windows, doors, or other openings in the wall against the will of the other is that this would injuriously restrict the practical uses to be made of it by the latter.³

§ 218. **Repairing, Removing, and Rebuilding Party Walls.** — A party wall being for the benefit and convenience of the adjoining proprietors, they are obliged to contribute ratably towards keeping it in suitable condition for the purposes for which it was erected or exists. If, therefore, it need repairing, one of them may do the work or have it done and hold the other responsible for one-half of the expense thereby reasonably incurred.⁴ But this right extends only to *repairs* properly so called. And if they allow the wall to become so dilapidated and ruinous that the only practical way to restore it is to rebuild it from the foundation up, the party-wall rights as such cease to exist, and neither can compel the other to contribute towards the renewal of the wall; nor will either of them, without the concurrence of the other, be justified in rebuilding it even entirely at his own expense.⁵ So, if any ordinary party wall be destroyed by inevitable accident, as by fire, wind, or flood, neither owner can compel the other to help to restore it, nor can either replace it without the consent of the other.⁶

¹ Walker v. Stetson, 162 Mass. 86; Wolfe v. Frost, 4 Sandf. Ch. (N. Y.) 72; Partridge v. Gilbert, 15 N. Y. 601; Quinn v. Morse, 130 Mass. 317; Mittenacht v. Slevin, 142 N. Y. 638, 683; Musgrave v. Sherwood, 54 How. Pr. (N. Y.) 338, 60 How. Pr. (N. Y.) 339; Sebald v. Mulholland, 155 N. Y. 455.

² Walker v. Stetson, 162 Mass. 86; Eno v. Del Vecchio, 4 Duer (N. Y.), 53. "There are decisions, however, to the effect that one who builds a party wall higher for his own convenience is entitled to contribution from the other owner, who, without an agreement in relation to the wall, uses the additions, to the extent of one-half of the value of the additions at the time they are used." Jones, Ease. § 703, citing Sanders v.

Martin, 2 Lea (Tenn.), 213; 31 Amer. Rep. 598.

³ § 215, *supra*; Normille v. Gill, 159 Mass. 427; Weston v. Arnold, 1 L. R. 8 Ch. App. 1084; Milne's Appeal, 81 Pa. St. 54; Harber v. Evans, 101 Mo. 661; Sullivan v. Graffort, 35 Iowa, 531; Harmann v. Jordan, 129 N. Y. 61.

⁴ Campbell v. Mesier, 4 Johns. Ch. (N. Y.) 334; Huck v. Flentye, 80 Ill. 258; Sherred v. Cisco, 4 Sand. (N. Y.) 480; Odd Fellows Ass'n v. Hegele, 24 Oreg. 16.

⁵ Partridge v. Gilbert, 15 N. Y. 601, 615; Antomarchi v. Russell, 63 Ala. 356; List v. Hornbrook, 2 W. Va. 340; Reynolds v. Fargo, 1 Sheld. (N. Y.) 531.

⁶ Sherred v. Cisco, 4 Sand. (N. Y.) 480, 487; Partridge v. Gilbert, 15 N. Y.

It is because of its characteristics, as above explained, that the existence of a party wall on a lot of land, and the ordinary covenants relating to it, do not constitute an encumbrance within the meaning of a covenant against encumbrances in a deed of the land or in a contract for its sale.¹ But when to these is added a perpetual covenant, running with the land, to the effect that the adjoining owners and their heirs and assigns shall forever share equally the expense of repairing or *rebuilding* the wall, and that whenever rebuilt it shall be of the same size as before and of similar materials, the wall controlled by such a covenant constitutes an encumbrance upon the titles to both of the lots.² So, a wall built entirely upon one piece of land, but subject to use for all purposes as a party wall by the owner of the adjacent lot, is an encumbrance upon the lot on which it stands.³

One owner of a party wall has no right to tear it down, or otherwise to do away with it, as long as it is safe and suitable for the adjoining owner.⁴ But, in the process of building or repairing on his own property, one may take it down, or otherwise deal with it for his own convenience, provided he restores it for the use of the other proprietor and causes the latter no injury or inconvenience while such removal, restoration, or other changes are being effected.⁵ He who thus assumes to deal with a party wall for his own benefit does so at his own risk, and must, at his peril, save his neighbor harmless from loss or legal injury by virtue of such change or changes.⁶

§ 219. **Division Fences.** — Somewhat similar to easements connected with walls are rights which sometimes exist in favor of landowners to compel their neighbors to build or

601; *Heartt v. Kruger*, 121 N. Y. 386; *Bonney v. Greenwood*, 96 Me. 335; *Pierce v. Dyer*, 109 Mass. 374, 377; *Huck v. Flentye*, 80 Ill. 258; *Orman v. Day*, 5 Fla. 385; *Hoffman v. Kuhn*, 57 Miss. 746.

¹ *Hendricks v. Stark*, 37 N. Y. 106; *Schaefer v. Blumenthal*, 169 N. Y. 221; *Weld v. Nichols*, 17 Pick. (Mass.) 538; *Bertram v. Curtis*, 31 Iowa, 46.

² *O'Neil v. Van Tassel*, 137 N. Y. 297; *Corn v. Bass*, 43 N. Y. App. Div. 53; *Savage v. Mason*, 3 Cush. (Mass.) 500; *Mackey v. Harmon*, 34 Minn. 168.

³ *Cecconi v. Rodden*, 147 Mass. 164; *Giles v. Dugro*, 1 Duer (N. Y.), 331;

Mohr v. Parmelee, 11 J. & S. (N. Y.) 320.

⁴ *Partridge v. Gilbert*, 15 N. Y. 601; *Partridge v. Lyon*, 67 Hun (N. Y.), 29; *Brondage v. Warner*, 2 Hill (N. Y.), 145.

⁵ *Standard Bk. v. Stokes*, L. R. 9 Ch. Div. 68; *Putzel v. Drovers & Mec. Nat. Bk.*, 78 Md. 349; *Partridge v. Gilbert*, 15 N. Y. 601.

⁶ *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Percival v. Hughes*, L. R. 9 Q. B. Div. 441; *Dorrity v. Rapp*, 72 N. Y. 307; *Schile v. Brokhahus*, 80 N. Y. 614. But he is not liable for injuries caused by the acts of an independent contractor. *Negus v. Becker*, 143 N. Y. 303; *Covington v. Geyler*, 93 Ky. 275.

help build and maintain division fences between the parcels of land. No such rights exist naturally at common law; but they sometimes arise by grant or prescription.¹ And, in most states, statutes now provide more or less fully for the erection, repairing, and preservation of division fences. Generally, such statutes require each owner of the contiguous properties to erect one-half of the fence, or to contribute one-half of its cost, also to pay one-half of the cost of its repairs, or restoration if destroyed, and to abstain from doing anything to cause its destruction or injury. Fence-viewers are also provided for and authorized to fix the amounts to be paid by the land-owners, respectively, when the latter can not agree.²(a) Such fences may be placed one-half upon the land of each conterminous owner, when there is no prescription or contract to the contrary.³ Such statutes, therefore, afford means of bringing fence servitudes into being and regulating them by operation of law.

Water Rights.

§ 220. **Kinds of Rights in Water.** — In connection with real estate, property in water can only be predicated of its use, which serves in its enjoyment to give value to the corporeal hereditaments with which its use is associated. Hence it is that the valuable legal incidents of water take the form of easements or servitudes. And most of them are not technical common-law easements, but rather servitudes, since they exist by nature and do not have one estate wholly dominant and another distinctly servient. When, however, artificial water rights, privileges, and obligations arise, as they sometimes do, by grant or prescription, they are common-law easements in the strict, technical sense of that term. The logical classification, therefore, of these forms of incorporeal heredita-

(a) In New York division fences in towns are now regulated by the Town Law, L. 1890, ch. 569, §§ 100–108, L. 1892, ch. 20, art. 5; and those between farms by 1 R. S. 353. See Gerard on Titles to R. E. (4th ed.) p. 779.

¹ Boyle v. Tamlyn, 6 B. & C. 329; Adams v. Van Alstyne, 25 N. Y. 232; Rust v. Low, 6 Mass. 90, 97; Moore v. Levert, 24 Ala. 310.

² Stim. Amer. Stat. L. §§ 2181–2190; 12 Amer. & Eng. Ency. L. 1050.

³ Duffy v. N. Y. & H. R. Co., 2 Hilt. (N. Y.) 496; Bronson v. Coffin, 108 Mass. 175; Harlow v. Stinson, 60 Me. 347, 349. See Pool v. Alger, 11 Gray (Mass.), 489

ments is into *a*, natural water rights and *b*, artificial water rights or easements. And the first of these classes presents three distinct divisions; namely, the rights, immunities, and burdens associated with, (a) natural and well-defined streams, (b) surface waters not in defined streams, and (c) percolating or subterranean waters — not in defined streams. These three groups of natural water rights and obligations will be first discussed, in the order named, and then the easements connected with artificial water courses will be briefly examined.

§ 221. *a. Natural Water Rights* — (a) **Well-defined Streams** — **Right of Access.** — Around natural bodies of water and streams flowing in defined channels (whether on or below the surface of the soil), the riparian proprietors have rights of access and enjoyment of the water facilities, which are valuable property rights and of which they can not be deprived without due process of law. For about forty years in the state of New York, it was formerly held that those whose titles extended only to high-water mark along navigable streams had no ground for complaint because their means of approach to such waters were shut off by the building of railroads, wharves, or other structures in front of their properties and below high-water mark. But this view has been discarded by that state; and the rule has been there adopted, which is generally followed, that such owners of lands can not legally be deprived, without their own consent, of the reasonable enjoyment of the waters in front of their properties.¹ Among such privileges, appertaining to each riparian owner, are the right of access to the navigable part of the water from the front of his land, and the right to construct a wharf for his own use or the use of the public. It is, accordingly, held that he may have an action for an injunction or for the recovery of damages against a railroad company or other person or institution by whose acts these natural rights are injuriously affected.² But the former doctrine of New York — that riparian owners may, with impunity, be shut off from navigable streams by obstructions placed below high-water mark — seems to be still adhered to in New Jersey, and possibly in a few other states.³ And it is the

¹ *Rumsey v. N. Y. & N. E. R. Co.*, 133 N. Y. 79; *N. Y. C. & H. R. R. Co. v. Aldridge*, 135 N. Y. 83; *Matter of City of New York*, 168 N. Y. 134. See *Hedges v. West Shore R. Co.*, 150 N. Y. 150.

² *Ibid.*; *Wall v. Pittsburgh Harbor Co.*, 152 Pa. St. 427.

³ *Stevens v. Paterson & Newark R. Co.*, 34 N. J. L. 532. See *Hoboken v. Pa. R. Co.*, 124 U. S. 656, 688, 690, 691; *Mann v. Tacoma Land Co.*, 153

uniform rule of the federal government and of the states alike that the rights of such owners must yield to the requirements of navigation and the improvements which it demands.¹

The common-law test of navigability of streams — tide-waters only being navigable — while applying well in England, where no rivers are in fact navigable except so far as the tide ebbs and flows, is not wholly applicable to a country like this with its large and important inland water highways. In the different states, therefore, there is much divergence of opinion as to what kinds of streams are to be regarded as navigable in the technical sense, and as to how far the ownership of riparian proprietors extends. The tendency of the western states is to treat rivers as navigable in law when they are so in fact, though there is no tide within them.² The eastern states adhere more closely to the common-law test. (a) The Supreme Court of the United States has decided that rivers, which form the boundaries between states, and are used or may be used for purposes of commerce, are navigable rivers of the United States; and this, too, without regard to the consideration whether the tide ebbs and flows within them. The same has been held as to the Great Lakes.³

(a) In New York, it is held that, except as to streams regulated by positive statute, the common-law criterion is applicable to streams in general, but that the Hudson and Mohawk, even above tide-water, are governed by the civil law, according to which the riparian proprietors do not own the bed of the stream. *Smith v. City of Rochester*, 92 N. Y. 473; *The Canal Appraisers*, 33 N. Y. 46. See *Lincoln v. Davis*, 53 Mich. 375; § 50, *supra*.

U. S. 273, 283, 287; *Coxe v. State of New York*, 144 N. Y. 396; *Mark v. West Troy*, 151 N. Y. 453.

¹ *Scranton v. Wheeler*, 179 U. S. 141; *Gibson v. United States*, 166 U. S. 269; *Slingerland v. International Const. Co.*, 169 N. Y. 60. In the case last cited, it was decided that, if the improvement permanently injured the riparian owner's access to the navigable water, he might recover damages for the loss; but the proof of such loss and damage must be very clear and convincing.

² *Barney v. Keokuk*, 94 U. S. 324; *Sweringen v. St. Louis*, 185 U. S. 38; *Chase's Blackst.* p. 221.

³ *Shively v. Bowlby*, 152 U. S. 1-58; *Water Power Co. v. Water Comm'rs*,

168 U. S. 349; *Sweringen v. St. Louis*, 185 U. S. 38; *Kean v. Calumet Canal Co.*, 190 U. S. 452; *Hardin v. Shedd*, 190 U. S. 508; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387; *The Montello*, 11 Wall. (U. S.) 411; *The Daniel Ball*, 10 Wall. (U. S.) 557; § 50, *supra*. It is the law of many of our states that, while the public has the right to navigate the large streams, in which the tide does not ebb and flow, but which are in fact navigable, yet the title to the soil of such streams is vested in the riparian owners. *Smith v. City of Rochester*, 92 N. Y. 473; *Magnolia v. Marshall*, 39 Miss. 119; *Eneminger v. The People*, 47 Ill. 366; *Ryan v. Brown*, 18 Mich. 196; *Blanchard v. Porter*, 11

Below high-water mark of navigable waters, in most jurisdictions, the state is the owner of the land, subject to the rights of the riparian proprietors, and the right of navigation in favor of such proprietors and the public generally.¹ The state holds such lands in trust for the public; and while it may make reasonable grants and concessions of the land under water, to individuals or corporations, it can not grant or give up so much as to make a practical abdication of its control over such waters or so as to prejudice the public right of navigation or the private rights of the riparian owners.² When the stream or body of water is not navigable, the rights of the state, or of the public, are generally not involved, and the natural servitudes exist simply among the neighboring owners along the banks.

§ 222. **Ownership and Use of Natural Streams.** — The proprietors along the banks of a stream do not own the waters thereof as such; and this is true though they own the bed of the stream, — it not being navigable, — and though for a portion or even all of its course one person may own all the soil over which it flows and the land on both sides.³ But each has a right to its reasonable use, as it flows past or over or through his property, whether it be on or below the surface of the soil; and each one can require of his neighbors and of all the riparian owners that it shall be permitted to flow upon and over or through his land in its natural bed, unpolluted and substantially undiminished in quantity by virtue of anything done by them.⁴

In so far as it relates to the contamination of flowing

Ohio, 138. A grant by the crown (or state) of the land along a navigable sound and the islands therein does not include the land below high-water mark, unless the intent that it shall do so is expressly declared in the grant. *Delancey v. Piegras*, 138 N. Y. 26.

¹ *Shively v. Bowlby*, 152 U. S. 1, and cases cited.

² *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387. See *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690.

³ *Embrey v. Owen*, 4 Exch. 353; *Sturr v. Beck*, 133 U. S. 541; *Brown v. Bowen*, 30 N. Y. 519; *Colrick v. Swinburne*, 105 N. Y. 503; *Acquaackanonck*

Water Co. v. Watson, 29 N. J. Eq. 366; *Lord v. Meadville Water Co.*, 135 Pa. St. 122; *Merrifield v. Worcester*, 110; *Mass.* 216; *Davis v. Fuller*, 12 Vt. 178; *Mitchell v. Bain*, 142 Ind. 604.

⁴ *Aqua currit et debet currere ut currere solebat*. *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 702; *Phila. v. Spring Garden*, 7 Pa. St. 348; *Clark v. Pa. R. Co.*, 145 Pa. St. 438; *Brewster v. Rogers Co.*, 169 N. Y. 73; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Watuppa Reservoir Co. v. Fall River*, 134 Mass. 267; *Clark v. Pa. R. Co.*, 145 Pa. St. 438, 449; *Warren v. Westbrook Mfg. Co.*, 88 Me. 69, 71; *Young v. Bankier Distillery Co.* (1893) App. Cas. 691.

waters, this rule is practically absolute.¹ If there be such a thing, in any jurisdiction, as a legal right to foul the waters of a natural stream in any degree, it must be very closely restricted in its extent and must be founded on the obligation sometimes placed upon the individual by the demands of the arts or sciences, or of proper agriculture or manufacture, for the promotion or conservation of the greater good of the public in general.² An illustration of such a requirement is found in the mining districts of Pennsylvania, where the courts permit the water from a mine lawfully worked to be poured into a natural stream even though the stream is thereby somewhat polluted.³

The rule as to the diversion of a stream is also absolute, to the extent that it enables each owner to insist that the stream, however much it may be shifted around on land of others, shall flow upon and from his land in its natural channel.⁴ As to the diminution of the quantity of the water, the circumstances of each case, such as its volume, the rapidity of its flow, and the character of the surrounding country must all be taken into consideration in determining the rights and duties of the riparian proprietors. Each of them may use all that is necessary for drinking and domestic purposes,⁵ and all that is otherwise required for any objects that will not result in an unreasonable diminution of the quantity of water to the mate-

¹ *Pennington v. Brinsop Hall Coal Co.*, L. R. 5 Ch. Div. 769; *Jackman v. Arlington Mills*, 137 Mass. 277; *Dwight Printing Co. v. Boston*, 122 Mass. 583; *Prentice v. Geiger*, 74 N. Y. 341; *Mann v. Willey*, 51 N. Y. App. Div. 169; *Acquaackanonck Water Co. v. Watson*, 29 N. J. Eq. 366; *Lyon v. McLaughlin*, 32 Vt. 423; *Canfield v. Andrews*, 54 Vt. 1; *Silver Spring B. & D. Co. v. Wansuck Co.*, 13 R. L. 611; *Lockwood Co. v. Lawrence*, 77 Me. 297; *Barrett v. Greenwood Cem. Ass'n*, 159 Ill. 385.

² *Tenn. Coal. & I. R. v. Hamilton*, 100 Ala. 252, 260; *Sanderson v. Pa. Coal Co.*, 86 Pa. St. 401, *Miss. Mills Co. v. Smith*, 69 Miss. 299.

³ *Pa. Coal Co. v. Sanderson*, 113 Pa. St. 126. The discharge into a stream of the usual impurities from streets does not give a cause of action against the city or town. *Chatfield v. Wilson*, 28

Vt. 49; *Frazier v. Brown*, 12 Ohio St. 294. And see *Stone v. State*, 138 N. Y. 124.

⁴ *Stowell v. Lincoln*, 11 Gray (Mass.), 434; *Fletcher v. Smith*, L. R. 2 App. Cas. 781; *Hartshorn v. Chaddock*, 135 N. Y. 116; *Covert v. Cranford*, 141 N. Y. 521; *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293, 296; *Kensit v. Gt. Eastern R. Co.*, L. R. 27 Ch. Div. 122; *St. Anthony F. W. P. v. Minneapolis*, 41 Minn. 270.

⁵ It is said that he may exhaust the water, if necessary, for culinary and other domestic purposes of his family, or for watering his cattle. *Swindon Water Works v. Wilts Canal*, 7 H. L. Cas. 697; *Wadsworth v. Tillotson*, 15 Conn. 366; *Anthony v. Lapham*, 5 Pick. (Mass.) 175; *Swift v. Goodrich*, 70 Cal. 103; *Kaler v. Campbell*, 13 Oreg. 596.

rial detriment of the other owners along the stream.¹ Any abstraction of the water, which is unreasonable under the circumstances, will give rise to a cause of action, whether it be done by directly pumping or dipping it from the stream or by indirectly removing it in some other manner. It was accordingly held, in *Smith v. City of Brooklyn*,² that the city was liable in damages to the riparian owners, for greatly diminishing the volume of the flow of a natural stream by pumping large quantities of water from artesian wells sunk by it in its own lands at and near the sources of the water supply. But where the waters directly taken are only percolating to the stream and are not in a definite channel, as was true in the *Smith* case in New York, the opposite rule remains clearly the law of England.³

These rights and obligations in natural streams may, of course, be modified by contracts express or implied, or by prescriptive titles or privileges.⁴ In some of the United States, also, especially in those along the Pacific Coast and Rocky Mountains having important mining interests, prior appropriation of water facilities is made to give superior rights.⁵ And the so-called mill acts of several states give special facilities for milling operations to certain riparian owners, particularly to those who are the first to take advantage of the provisions of such statutes.⁶ The right of irrigation, moreover, in some instances even to the extent of practically exhausting such currents, is authorized by legislative enactments in some of the arid and hotter sections of this country.⁷ These rights,

¹ *Bailey & Co. v. Clark* (1902), 1 Ch. 649; *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293; *Clark v. Pa. R. Co.*, 145 Pa. St. 438; *Gould v. Boston Duck Co.*, 13 Gray (Mass.), 442; *Dyer v. Cranston Print-Works Co.*, 22 R. I. 506; *Woodin v. Wentworth*, 57 Mich. 278; *City of Canton v. Shock*, 66 Ohio St. 19; *Fisher v. Fiege*, 137 Cal. 39.

² 160 N. Y. 357. See also *Stillwater Water Co. v. Farmer*, 97 N. W. Rep. (Minn.) 907; *Haupt's Appeal*, 125 Pa. St. 211; *Higgins v. Flemington W. Co.*, 36 N. J. Eq. 538; *Moulton v. Newburyport W. Co.*, 137 Mass. 163.

³ *Popplewell v. Modkinson*, 4 Exch. 248; *Bradford Corp. v. Ferrand* (1902), 2 Ch. 655; *Chasemore v. Richards*, 2 H. & N. 168, 7 H. L. Cas. 349.

⁴ *Manning v. Wasdale*, 5 Adol. & El. 758; *Wiley v. Hunter*, 2 Eastern, 228. No easement can be acquired as a right to pollute a stream against a statutory prohibition. *Brookline v. Mackintosh*, 133 Mass. 215. Nor by prescription to create a public nuisance. *Commonwealth v. Upton*, 6 Gray (Mass.), 473; *North Salem v. Eagle Co.*, 138 Mass. 8.

⁵ *Stim. Amer. Stat. L.* §§ 418, 1171.
⁶ *Angel Wat. Cour.* § 483; *Lincoln v. Chadbourne*, 56 Me. 197; *Smith v. Agawam Canal Co.*, 2 Allen (Mass.), 355; *Lowell v. Boston*, 111 Mass. 454, 467.

⁷ *Stim. Amer. Stat. L.* § 1179; *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690.

beyond what the common law permits, and their accompanying obligations depend on the special form of the statutes in each state where such an enactment exists.

§ 223. (b) **Rights as to Surface Waters.**—The rule of the civil law is that every owner of land has a right against his neighbors to have surface water (i. e., not in a fixed stream) flow according to the natural contour of the surface of the land. The upper proprietor has a servitude to let the rain and other surface waters pass naturally from his property upon the field of the lower owner; and the latter has a reciprocal servitude against the former to insist that they shall continue to flow in that manner.¹ But the common-law principle, in this regard, is that surface water is a common enemy, which every one may get rid of as best he can, provided he does not directly use it for the injury of his neighbor. The owner of the higher land may retain it on his property, or let it flow to the lower level; and the lower proprietor may either receive it upon his land, or ward it off, by filling in and making his land higher, or by means of embankments or other obstructions.² A few of the states of this country, such as Illinois, Iowa, Louisiana and Pennsylvania, have adopted the civil-law doctrine upon this matter;³ while, in England and the rest of the United States, the rule of the common law prevails.⁴

The common-law right of every landowner to ward off and

¹ Walker v. So. Pac. R. Co., 165 U. S. 593, 602; Foley v. Godchaux, 48 La. Ann. 466; La. Code, Art. 656; Rhoads v. Davidheiser, 133 Pa. St. 226.

² Broadbent v. Ramsbotham, 11 Exch. 602, 614; Walker v. So. Pac. R. Co., 165 U. S. 593, 602; Barkley v. Wilcox, 86 N. Y. 140; Peck v. Goodberlett, 109 N. Y. 180; Bowlsby v. Speer, 31 N. J. L. 351; Cassidy v. Old Colony R. Co., 141 Mass. 174; City of Franklin v. Durgee, 71 N. H. 186; Sanguinetti v. Peck, 136 Cal. 466.

³ Peck v. Herrington, 109 Ill. 611; Anderson v. Henderson, 124 Ill. 164; Livingston v. McDonald, 21 Iowa, 160; Preston v. Hull, 77 Iowa, 309; La. Code, Art. 656; Foley v. Godchaux, 48 La. Ann. 466; Miller v. Laubach, 47 Pa. St. 154; Rhoads v. Davidheiser, 133 Pa. St. 226.

⁴ Broadbent v. Ramsbotham, 11

Exch. 602, 614; Walker v. So. Pac. R. Co., 165 U. S. 593, 602; Gould v. Booth, 66 N. Y. 62; Peck v. Goodberlett, 109 N. Y. 180; Bowlsby v. Speer, 31 N. J. L. 351; Cassidy v. Old Colony R. Co., 141 Mass. 174; Byrne v. Farmington, 64 Conn. 367; Schlieter v. Phillipy, 67 Ind. 201; Chicago K. & N. W. R. Co. v. Steck, 51 Kan. 737; Murphy v. Kelley, 68 Me. 521; Rowe v. St. P. M. & M. R. Co., 41 Minn. 384; McCormick v. Kansas City, etc. R. Co., 70 Mo. 359; Beatrice v. Leary, 45 Neb. 149; City of Franklin v. Durgee, 71 N. H. 186; Wakefield v. Newell, 12 R. I. 75; Rice v. Norfolk, 130 N. C. 375; Edwards v. Charlotte, etc. R. Co., 39 S. C. 472; Gross v. Lamposas, 74 Tex. 195; Beard v. Murphy, 37 Vt. 99; Sanguinetti v. Peck, 136 Cal. 466; Cass v. Dicks, 14 Wash. 75; Lessard v. Stram, 62 Wis. 112.

get rid of, in the best way he can, the surface water which he does not want on his property, is qualified by the requirement that he shall not converge it into a stream and pour it in a flood upon the land of the adjoining proprietor. And *a fortiori* this same requirement is insisted on by the civil law. The lower land may be filled up, or obstructions may be erected, and thus the natural flow of the water reversed; but to do this in such a manner as to create an artificial channel or current upon the adjacent land would be to impose upon it an unnecessary burden.¹ And, therefore, if a railroad company, in the construction of its road, erect a long embankment, through an aperture in which it allows rain water to pour from the higher ground on one side upon the lower land on the other, it is liable in damages to the owner of the lower property for the resulting injury.² And, when one constructs a ditch or drain, by the water from which he digs a channel upon his neighbor's land, he is thereby guilty of a legal wrong against such neighbor.³

§ 224. (c) **Rights as to Percolating and Subterranean Waters.**—Resting on the maxim *cujus est solum ejus est usque ad cælum et ad orcum*, is the well-established rule of both the civil and the common law that one may take, use, and dispose at will of the waters that are in or percolating through his soil and are not in any natural stream.⁴ The water mixed in with one's soil, and not flowing regularly or definitely, is, while there, a part of his land; and he has ordinarily the same dominion over it that he has over the sand, clay, or loam of which his soil is more permanently composed. The decision which established this principle in England was *Acton v. Blundell*;⁵ and the rule itself is often named from that case. It has been

¹ *Hurdman v. Nor. East. R. Co.*, L. R. 3 C. P. Div. 168; *Walker v. So. Pac. R. Co.*, 165 U. S. 593, 602; *McKee v. D. & H. Canal Co.*, 125 N. Y. 353; *Kelly v. Dunning*, 39 N. J. Eq. 482; *Bates v. Westborough*, 151 Mass. 174; *Osten v. Jerome*, 93 Mich. 196; *Dayton v. Drainage Comm'rs*, 128 Ill. 271; *Rice v. Norfolk*, 130 N. C. 375.

² *Illinois Cent. R. Co. v. Miller*, 68 Miss. 760; *Kansas City M. & B. R. Co. v. Lackey*, 72 Miss. 881.

³ *Deigleman v. N. Y. L. E. & W. R. Co.*, 12 N. Y. Supp. 83; *Bedell v. Village of Sea Cliff*, 18 N. Y. App. Div.

261. See *Bowlsby v. Speer*, 31 N. J. L. 351, 353, per Beasley, J., cited in *Walker v. So. Pac. R. Co.*, 165 U. S. 593, 602.

⁴ *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 2 H. & N. 168; *Wilson v. New Bedford*, 108 Mass. 261; *Bloodgood v. Ayers*, 108 N. Y. 400; *Bliss v. Greeley*, 45 N. Y. 671, 674; *Roath v. Driscoll*, 20 Conn. 533; *Haldeman v. Bruckhart*, 45 Pa. St. 514; *Buffum v. Harris*, 5 R. I. 243; *Miller v. Black Rock Spring Co.*, 99 Va. 747.

⁵ 12 M. & W. 324.

followed by many adjudications in that country; and by none more fully than by several well-considered recent decisions.¹

In the United States the same principle was recognized and settled as law, even before the decision of *Acton v. Blundell*.² It is here held to include, not only water, but also percolating oil and natural gas.³ Where the owner of a tract of land sold to A the right to draw water from a spring on it, and then sold the land to B, and B dug a well twenty feet from the spring, which cut off A's supply of water from the spring, it was held that A was without remedy.⁴ And, in a case in which A dug in his own land a well for the obtaining of natural gas, and exploded therein nitro-glycerine and thus drew away all the supply of gas from a similar well on B's adjacent property, it was decided that this was *damnum absque injuria* against B and gave him no cause of action.⁵

While there is some conflict of opinions and decisions as to the effects of a malicious intent in so operating in or upon one's own land as to deprive one's neighbors of water, oil, or gas, which they could otherwise enjoy, some states holding that this must not be maliciously done,⁶ yet the view of a majority of the best courts, as declared in the recent and most fully considered cases, is well expressed in *Bradford v. Pickles*⁷ by Lord Halsbury, L. C., who says: "This is not a case in which the state of mind of the person doing the act can affect the right to do it. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before

¹ *Broadbent v. Ramsbotham*, 11 Exch. 602; *Rawstron v. Taylor*, 11 Exch. 369; *Bradford v. Pickles* (1895), App. Cas. 587; *Bradford v. Ferrand* (1902), 2 Ch. 655.

² *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Chatfield v. Wilson*, 28 Vt. 49, 54; *Saddler v. Lee*, 66 Ga. 45.

³ *Westmoreland Gas Co. v. DeWitt*, 130 Pa. St. 235; *People's Gas Co. v. Tyner*, 131 Ind. 277; *Wagner v. Malory*, 169 N. Y. 501, 505. See *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278.

⁴ *Bliss v. Greeley*, 45 N. Y. 671, 674; *Ballacorkish Mining Co. v. Harrison*, 5 P. C. 49; *Trout v. McDonald*, 83 Pa. St. 144; *Coleman v. Chadwick*, 80 Pa. St. 81.

⁵ *People's Gas Co. v. Tyner*, 131 Ind. 277, 280. In this case, it is said: "Water, oil, and still more strongly gas, may be classed by themselves, if the analogy be not too strong, as minerals *feræ naturæ*. . . . They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into another's land or come under another's control, the title of the former owner is gone."

⁶ *Chesley v. King*, 74 Me. 164; *Roath v. Driscoll*, 20 Conn. 533; *Haldeman v. Bruckhart*, 45 Pa. St. 514; *Redman v. Forman*, 83 Ky. 214; *Springfield Water Works v. Jenkins*, 62 Mo. App. 74.

⁷ (1895), App. Cas. 587.

your lordships seem to me to be absolutely irrelevant." And it was held in that case that the defendant might bore many large wells in his own land, and thus draw the supply of water from plaintiff's wells which had long been used to obtain water for the use of a town, although defendant's motive in so acting was evidently to compel the plaintiff, if possible, to purchase his land at a high price, and although the defendant was pumping the water *for the purpose of taking it away from both properties and selling it as merchandise*.¹

The motive — the mental attitude whether benevolent or malevolent — of him who takes percolating water from his own land is, then, as a rule, quite immaterial. But it is now settled in New York that he is liable in damages to his neighbor, whom he injures by so taking it and *leading it away from the land for the purpose of disposing of it as merchandise*, and so preventing it from returning to the soil. It was so decided in *Forbell v. City of New York*,² in which the defendant, by pumping large quantities of water from artesian wells in its own land and taking it by pipes to supply the Borough of Brooklyn with water, greatly decreased the fertility of lands of other owners near the wells. The Court of Appeals says in that case: "In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired." The reason-

¹ See also *Phelps v. Nolen*, 72 N. Y. 39; *Clinton v. Myers*, 46 N. Y. 511; *Chatfield v. Wilson*, 28 Vt. 49; *Walker*

v. Cronin, 107 Mass. 555, 564; 14 Alb. L. Jour. 61; *Cooley*, Torts, 688, 691, 2 164 N. Y. 522.

ing of this case and also that of *Smith v. City of Brooklyn*, which held the city liable for reducing the flow of a natural stream by pumping water in the same manner and for the same purpose, are affirmed in the later adjudication of *Reisert v. City of New York*.¹ And, similarly, the Supreme Court of Minnesota has held that a landowner must not collect from his own land, and waste, percolating waters, which would otherwise be used for the benefit of the public.²

A landowner must not foul or poison the water percolating through his property, so as to render such water dangerous or deleterious in quality when it reaches the land of a neighboring owner.³

§ 225. *b. Artificial Water Rights.*—The water rights and their attendant obligations thus far discussed are chiefly natural servitudes. The privileges and immunities are reciprocal. They do not present one tenement as wholly dominant, and the other as distinctly and only servient; but they afford cases in which each of the neighboring owners has rights incident to the natural location of their lands. If the owner of two parcels of land, through which a natural stream flows, sell one of them, neither he nor his purchaser will have the right to stop or divert the waters of the stream, against the will of the other.⁴ And, if one of them should change it on his own land and thus keep it flowing for twenty years in a different channel over the other's property, and the latter should during that time use it in its new location for the running of a mill, neither could again change it without the consent of the other.⁵ Since they are dealing with a natural stream, their rights and duties remain reciprocal. A broad and important distinction exists between rights and burdens such as these and the easements which may exist in connection with artificial streams and bodies of water, created for temporary purposes, although the latter may have been enjoyed for more than twenty years.

The rights which one man may have against another, in connection with artificial ponds or streams, are, then, common-law *easements*, as distinguished from mere natural servitudes. One landowner has the right and the other must endure the bur-

¹ 174 N. Y. 196, 200. See § 222, *supra*.

² *Stillwater Water Co. v. Farmer*, 93 N. W. Rep. 907.

³ *Hodgkinson v. Enner*, 4 B. & S. 229.

⁴ *Tud. Lead. Cas. R. P.* 111; see

Miller v. Lapham, 44 Vt. 416; *Hapgood v. Brown*, 102 Mass. 451.

⁵ *Belknap v. Trimble*, 3 Paige (N. Y.), 577, 605; *Delaney v. Boston*, 2 Harr. (Del.) 489, 491.

den; and there is no corresponding privilege or advantage operating in the other direction.¹ Thus, if one pump or otherwise draw subterranean waters from his own land, or gather the surface waters into streams, and after making use of them for mining, manufacturing, or other purposes, cause them to flow in a current unto his neighbor's land, he will thus commit a trespass upon that land, unless he has acquired by grant or prescription the privilege of so dealing with the waters. When, however, he has obtained such privilege by one of those methods, there arises thereby no corresponding right, in favor of the lower proprietor, to have the flow of the water continued, no matter how beneficial it may have become to him. He is simply the servient tenant, who must endure the burden of the artificial stream without thereby acquiring for himself any special correlative rights.²

Easements in artificially produced streams or bodies of water are ordinary forms of that species of incorporeal hereditaments, and are governed by the laws of easements generally, heretofore discussed in full. They may be acquired by either of the forms of grant, or by prescription. One of the most familiar illustrations of them is the easement of drainage, created by implied grant upon the severance of an entire tract of land and sale of one piece, when one of the lots is enjoying the ease or accommodation of being drained over or through the other.³ Another instance is the right of eaves' drip, where a houseowner has acquired the right to let rain water flow from his roof upon his neighbor's lot.⁴ And still another is the easement which one who is mining in his own land may have to get rid of the waste waters by letting them run over the lands of contiguous owners.⁵

¹ There are a few rare cases, in which this is denied. Thus, where one acquired a right to pour water in an artificial channel upon a lower owner's land, it was held, in two cases, that the latter had thereby gained a right on his part to have the stream continue to flow. *Shepardson v. Perkins*, 58 N. H. 354; *Reading v. Althouse*, 93 Pa. St. 400. And see *Bowne v. Deacon*, 32 N. J. Eq. 459.

² *Arkwright v. Gell*, 5 M. & W. 203; *Wood v. Wand*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 291; *Mayor v. Chadwick*, 11 Adol. & El. 571; *Sampson v. Hoddinott*, 1 C. B. n. s. 590;

Wash. Ease. (4th ed.) 418-427; *Tud. Lead. Cas. R. P.* 120.

³ *Simmons v. Cloonan*, 47 N. Y. 3; *Paine v. Chandler*, 134 N. Y. 385; *Wright v. Williams*, 1 M. & W. 77; *White v. Chapin*, 12 Allen (Mass.), 516; *Leidlein v. Meyer*, 95 Mich. 586; § 139, *supra*.

⁴ *Harvey v. Walters*, 8 C. P. 162; *Keats v. Hugo*, 115 Mass. 204, 216; *Grace M. E. Church v. Dobbins*, 153 Pa. St. 294; *Rose v. Bunn*, 21 N. Y. 275; *Neale v. Seeley*, 47 Barb. (N. Y.) 314.

⁵ *Arkwright v. Gell*, 5 M. & W. 203; *Pa. Coal Co. v. Sanderson*, 113 Pa. St. 126.

CHAPTER XIII.

(4) PROFIT À PRENDRE.

§ 226. Definition and illustrations.

§ 227. *Profit à prendre* in gross, or as appurtenant to land.

§ 228. How a *profit à prendre* may be acquired.

§ 229. Kinds of *profit à prendre*.

§ 230. Mining rights.

§ 231. Mining laws of this country.

§ 232. (a) Discovery of mines.

§ 233. (b) Location of mines.

§ 234. (c) Annual labor on mines.

§ 226. **Definition and Illustrations.** — A *profit à prendre* is a right to take something of value from the land of another. It is an incorporeal hereditament, since it is a mere *right*; and it differs from an easement, as was above pointed out, in the fact that the latter, which is also a mere right, does not authorize the taking of anything valuable from the servient tenement. The right to reach a highway from my land, by driving with my horse and carriage across the land of my neighbor, is an easement. The right to let my horse pasture on my neighbor's field, and thus to take something from it, is a *profit à prendre*.¹ The term servitude, in its civil-law sense and as ordinarily employed, includes both easement and *profit à prendre*. The latter is that special form of servitude, or right *in alieno solo*, which authorizes the taking of some part of another's soil or its contents, or some of its valuable products.² Other illustrations of it are the right to take marl, loam, peat, gravel, coal, or other minerals;³ the privilege of fishing and

¹ *Rose v. Bunn*, 21 N. Y. 275; *Smith v. Floyd*, 18 Barb. (N. Y.) 522; *Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 14; *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639; *Worcester v. Green*, 2 Pick. (Mass.) 425, 429.

² Some authorities, however, define the word *easement* in a sense broad enough to include *profit à prendre*. Post

v. Pearsall, 22 Wend. (N. Y.) 425; *Owen v. Field*, 102 Mass. 90, 103; *Ritger v. Parker*, 8 Cush. (Mass.) 145; *Huff v. McCauley*, 53 Pa. St. 206, 209.

³ *Manning v. Wasdale*, 5 Adol. & El. 758; *Chetham v. Williamson*, 4 East, 469; *Grubb v. Grubb*, 74 Pa. St. 25; *Worcester v. Green*, 2 Pick. (Mass.) 425, 429.

taking away the fish caught,¹ or of shooting and taking away game;² the right to cut and remove wood, and the authority to gather and appropriate the seaweed from the shore of another's land.³ But, since water in its natural conditions is so movable and wandering a thing, it is not treated in this connection as a part of the land or its products; and an established right, which one man may have to take from the land of another either surface water or water percolating or flowing in a natural stream, is usually an easement or form of servitude that is not a *profit à prendre*.⁴

§ 227. *Profit à Prendre, in Gross or as an Appurtenance to Land.* — This form of incorporeal hereditament may be, and frequently is, owned in connection with land (as a dominant estate) and as an appurtenance to the same; or it may be owned as a right in gross. It is probably most commonly found in the latter form. When it is an appurtenance to a dominant estate, it readily passes with a conveyance of the land; and it can not ordinarily be used for any purpose other than for the benefit or convenience of such land. It carries with it practically all the incidents of a common-law easement, with the addition of the right to take something from the servient estate.⁵

¹ *Peers v. Lucy*, 4 Mod. 354, 366; *Turner v. Hebron*, 61 Conn. 175; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90; *Baylor v. Decker*, 133 Pa. St. 168. The right to fish in navigable waters is common to all, unless some exclusive privilege or franchise has been obtained by grant or prescription. *Carter v. Murcot*, 4 Burr. 2162; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90; *Weston v. Sampson*, 8 Cush. (Mass.) 347; *Chalker v. Dickinson*, 1 Conn. 382; *Phipps v. State*, 22 Md. 380. The right to fish in non-navigable waters belongs *prima facie* to the owner of the land under the water. But, if one own the water distinct from the land beneath it, the right of taking the fish is his, rather than the property of the owner of the land. *Turner v. Hebron*, 61 Conn. 175; *Waters v. Lilley*, 4 Pick. (Mass.) 145; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90.

² *Wickham v. Hawker*, 7 M. & W. 63; *Year Book*, 12 Hen. VII. 25; *Year Book*, 13 Hen. VII. 13, pl. 2. *Bingham*

v. Saleme, 15 Oreg. 208; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 37.

³ *Hill v. Lord*, 48 Me. 83; *Emans v. Turnbull*, 2 Johns. (N. Y.) 314; *Sale v. Pratt*, 19 Pick. (Mass.) 191; *Church v. Meeker*, 34 Conn. 421. See *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149, 162.

⁴ *Manning v. Wasdale*, 5 Adol. & El. 758, 763; *Wickham v. Hawker*, 7 M. & W. 63; *Borst v. Empie*, 5 N. Y. 33; *Goodrich v. Burbank*, 12 Allen (Mass.), 459, 461; *Hill v. Lord*, 48 Me. 83; *Spensley v. Valentine*, 34 Wis. 154. But the right to take water from a closed and retaining receptacle, such as a cistern, may be treated as a *profit à prendre*. *Hill v. Lord*, 48 Me. 83, 99.

⁵ *Douglass v. Kendal*, Cro. Jac. 256; *Bailey v. Stephens*, 12 C. B. N. S. 91, 109; *Huntington v. Asher*, 96 N. Y. 604; *Taylor v. Millard*, 118 N. Y. 244; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Grubb v. Grubb*, 74 Pa. St. 25, 33.

When on the other hand a *profit à prendre* is in gross, it is a personal privilege which does not pass with the transfer of any land, but is in the nature of an individual interest or ownership in the land in which the right exists.¹ As was explained above, an *easement* in gross is treated, in most jurisdictions, as a special, individual privilege, which belongs to the grantee alone and can not be assigned or transferred to another.² But a *profit à prendre* in gross is a distinct, independent object of ownership, which is in its nature assignable, devisable, and inheritable.³ If, for example, A, as an individual and not as the owner of any land, have the right to dig and take coal from the land of B, he does not thereby own any of the coal before he has dug it, but he has an incorporeal right to which attaches all the ordinary incidents of real-property ownership.

§ 228. **How a Profit à Prendre may be acquired.** — A *profit à prendre* may be brought into existence by any of the methods by which common-law easements may be acquired; i. e., by express grant, reservation in a deed of the servient land (which is in reality a form of express grant), implied grant, and prescription.⁴ Such a right may also be dedicated or created by operation of law; but it never exists by nature, nor arises by custom.⁵ When gained by prescription, it is most commonly, though not necessarily, not a right in gross, but an incident to land as a dominant estate;⁶ but, when acquired by any of the other methods, it is most frequently a *profit à prendre* in gross.

§ 229. **Kinds of Profit à Prendre.** — In discussing under the term "common" the chief forms of *profit à prendre* as they existed when he wrote, Blackstone says:⁷ "And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.

¹ *Pierce v. Keator*, 70 N. Y. 419.

² § 127, *supra*.

³ *Palmer's Case*, 5 Coke, 24 b; *Wickham v. Hawker*, 7 M. & W. 63; *Post v. Pearsall*, 22 Wend. (N. Y.) 425, 432; *Taylor v. Millard*, 118 N. Y. 244; *Goodrich v. Burbank*, 12 Allen (Mass.), 459, 461; *Hill v. Lord*, 48 Me. 83, 96. *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 39; *Cadwalader v. Bailey*, 17 R. I. 495, 500.

⁴ *Merwin v. Wheeler*, 41 Conn. 14, 25; *Waters v. Lilley*, 4 Pick. (Mass.) 145; *Littlefield v. Maxwell*, 31 Me. 134.

⁵ *Gateward's Case*, 6 Coke, 59 b; *Grimstead v. Marlowe*, 4 T. R. 717; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Waters v. Lilley*, 4 Pick. (Mass.) 145; *Perley v. Langley*, 7 N. H. 233; *Moor v. Cary*, 42 Me. 29; *Cobb v. Davenport*, 33 N. J. L. 223.

⁶ *Merwin v. Wheeler*, 41 Conn. 14; *Littlefield v. Maxwell*, 31 Me. 134; *Waters v. Lilley*, 4 Pick. (Mass.) 145; *Hinckel v. Stevens*, 35 N. Y. App. Div. 5.

⁷ 2 Blackst. Com. pp. *32-*35.

“1. Common of pasture is a right of feeding one’s beasts on another’s land : for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor ; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross. Common *appendant* is a right belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord’s waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plough, or such as manure the ground. . . . Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity : but may be annexed to lands in other lordships, or extend to other beasts, besides such as are generally commonable ; as hogs, goats, or the like, which neither plough nor manure the ground. . . . Common *because of vicinage*, or neighborhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another ; the beasts of the one straying mutually into the other’s fields, without any molestation from either. . . . Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man’s person ; being granted to him and his heirs by deed ; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor. . . .

“2, 3. Common of *piscary* is a liberty of fishing in another man’s water ; as common of *turbary* is a liberty of digging turf upon another’s ground. There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects : though in one point they go much further ; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually ; but common of turbary, and those aforementioned, are a right of carrying away the very soil itself.

“4. Common of estovers or *estouviers*, that is, *necessaries* (from *estoffer*, to furnish), is a liberty of taking necessary wood, for the use of furniture or a house or farm, from off another’s estate. The Saxon word, *bote*, is used by us as synonymous to the French *estovers* : and therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the

house: which latter is sometimes called fire-bote: plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hay, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or devised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restricted by special covenant to the contrary."

"Of all these rights," says Digby, "by far the most important is the right of common of pasture."¹ But here the form of *profit à prendre* which Mr. Blackstone refers to in the words, "There is also a common of digging for coals, minerals, stones, and the like," is that which needs special discussion, as dealing with the important mining interests of this country.

§ 230. **Mining Rights and Ownerships, in General.** — Since the substances of which the earth is composed may be owned in layers, or *strata*, by different people, so that the property of one in its natural position may be vertically above that of another,² it is often a difficult question whether the sale and conveyance of a so-called mining right gives to the grantee the title to one of these *strata* — a corporeal hereditament — or only an incorporeal right to take minerals from the land of the grantor. When it is the latter, the grantee acquires simply a *profit à prendre*; he does not own any of the coals or other minerals in their natural place in the ground, before he has dug and removed them; and, when he has taken them by virtue of his right to do so, they are not realty, but personal property in his hands — the *proceeds* of his *profit à prendre*;³ whereas, if by the contract he obtain title to a *stratum*

¹ Digby, Hist. Law R. P. (5th ed.) p. 192. Mr. Digby shows how the uncultivated land of the township, from being the *common* property of all the townfolk, came, in the process of growth of manors, to be "regarded as the sole property of the lord of the manor and was called the lord's waste, and the old customary rights of the villagers came, as notions of strict legal rights of property were more exactly defined, to be regarded as rights of user on the lord's soil — as *jura in re aliena*. Still the name remained, and attached . . . to the waste

or uncultivated land itself, which was still usually called common land, as if the commoners had rights of property in common over the soil itself, instead of having simply rights *in alieno solo*." See also 1 Poll. & Mait. Hist. Eng. L. (2d ed.) pp. 620–622; Williams, Rights of Common, 37 *et seq.*

² § 209, *supra*.

³ Shep. Touchst. 96; Caldwell v. Fulton, 31 Pa. St. 475, 478; Hanley v. Wood, 2 Barn. & Ald. 724. See Vogel v. Webber, 159 Pa. St. 235.

of soil, he at once owns the minerals in it, as corporeal real property, while they are in their natural location in the ground.¹ The solution of the question usually turns on the language of the instrument employed, the guiding principle of construction being that, if the words used import an *exclusive right to take all* the coal or other minerals in certain described land, it is a conveyance of the minerals themselves as corporeal real property in place, but otherwise it is merely a grant of an incorporeal hereditament — a *profit à prendre* in the form of a privilege of taking minerals from another's land.² Thus, in *Huntington and Mountjoy's Case*, the grant was of a right to dig ore in the waste of a manor and to take turfs there sufficient to make alum and copperas; and it was held to convey only an incorporeal hereditament.³ But, where the transfer was of the right to dig coal under the grantor's land, "to any extent," it conveyed the ownership of the coal before it was mined.⁴ And a like result followed where the deed conveyed the exclusive right to search for, dig, and carry away the iron ore and limestone in a certain described parcel of land.⁵ In accordance with the rule that a deed between individuals is to be construed most strongly against the grantor, the later cases, especially in this country, have tended to resolve close questions of this character in favor of the grantee and decide that the ownership of the unmined or unquarried minerals or other substances passes to him.⁶ Such corporeal property is susceptible of subdivision of its ownership; but a *profit à prendre* in minerals — the mere *right* to take them from the land of another, and then own them as personal property — is at common law an entire, indivisible thing, and an attempt by its owner to convey only a part of it extinguishes it altogether.⁷ Some of the most important principles of these forms of *profit à prendre*, as mining rights in the United States, require a further brief discussion.

¹ *Caldwell v. Fulton*, 31 Pa. St. 475, 478.

² *Shep. Touchst.* 96; *Hanley v. Wood*, 2 Barn. & Ald. 724; *Caldwell v. Fulton*, 31 Pa. 475, 478; *Clement v. Youngman*, 40 Pa. St. 341; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290; *Silsby v. Trotter*, 29 N. J. Eq. 228.

³ *Godbolt*, 17.

⁴ *Caldwell v. Fulton*, 31 Pa. St. 475, 478.

⁵ *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

⁶ *Ibid.*; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Clement v. Youngman*, 40 Pa. St. 341; *Grubb v. Bayard*, 2 Wall. Jr. (U. S. Cir. Ct.) 81; *Bainbridge on Mines*, etc., 254, 255 (4th ed.), 369.

⁷ *Huntington and Mountjoy's Case*, *Godb.* 17; *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639; *Caldwell v. Fulton*, 31 Pa. St. 475, 478.

§ 231. **Mining Laws of this Country.**—By the common law of England, all mines of gold and silver belong to the crown, as an incident or flower of the royal prerogative.¹ In New York, the people, as successors to the rights of the king of Great Britain, became the owners of such mines; (a) and it may

(a) The New York statutes upon this topic have always been similar to those of England. See stat. Feb. 6, 1789; Sess. L. 12, ch. 18; R. S. pt. 1, ch. 9, tit. 11. They are now found in L. 1894, ch. 317, Art. VI., as amended by L. 1894, ch. 745, and L. 1902, ch. 503. They declare that, "The following mines are the property of the people of this state in their right of sovereignty: 1. All mines of gold and silver discovered, or hereafter to be discovered, within this state. 2. All mines of other metals, and of talc, mica or graphite, discovered, or hereafter to be discovered, upon any lands owned by persons not being citizens of the United States. 3. All mines of other metals, and of talc, mica or graphite, discovered, or hereafter to be discovered, upon lands owned by a citizen of the United States, the ore of which, on an average, shall contain less than two equal third parts in value of copper, tin, iron and lead, or any of those metals. 4. All mines and all minerals and fossils discovered, or hereafter to be discovered, upon any lands belonging to the people of this state. But all mines, of whatever description, other than mines of gold and silver, discovered upon any lands owned by a citizen of any of the United States, the ore of which upon an average, shall contain two equal third parts or more in value of copper, tin, iron and lead, or any of those metals, shall belong to the owner of such land."

The act authorizes any citizen of the state, who discovers a valuable mine upon the state's land, to work the same for twenty-one years, after giving the proper notice to the Secretary of State, and upon paying a royalty to the state of two per cent of the value of the products when ready for market. It also provides for corporations to be formed for mining purposes and to exercise the right of eminent domain in connection therewith; and

¹ Co. Lit. 4 a; 1 Inst. 4 a; 2 Inst. 572; Case of Mines, Plowd. 313. In the noted case last cited it was said: "The common law, which is founded upon reason, appropriates everything to the person whom it best suits; as common and trivial things to the common people; things of more worth to persons of a higher and superior class, and things most excellent to the person who excels all others: and because gold and silver are the most excellent things which the soil contains, the law has appointed them, as in reason it ought, to the person most excellent, and that is the King." In that case, also, it was decided, by a majority of the twelve judges, that, if any admixture of gold or silver were found in mines of copper, tin, lead,

or iron, the whole belonged to the crown, because the nobler metal attracted to it the less valuable; and, since the king could not hold property jointly with a subject, he therefore took the whole. This latter doctrine, to which a minority of the judges including Plowden himself dissented, was corrected by the statutes 1 Wm. & Mary, ch. 30, and 5 Wm. & Mary, ch. 6, which, however, allowed the king to take the proceeds of such mines provided he reimbursed the landowner at specified rates. Lord Coke says that the crown has no right, by virtue of its prerogative, to any other metals than gold and silver, for those are the only metals required for the coining of money for the use of the subjects. 2 Inst. 577, 578.

be safely assumed, in the absence of controlling statutes in any state, that mines of gold and silver are the property of the state in its sovereign capacity.¹ The United States government, however, is the owner of mines of those metals, as well as of all other mines, in its own lands, even though such lands be within the boundaries of one or more of the states. The right to take minerals from this public domain is now fully regulated by the United States statutes, passed May 10, 1872.² And the result of operating under those enactments is that the miner, before obtaining a complete title to the land itself (which he is authorized to go on and do if he wish, but which in many if not most cases he does not do), has a so-called mining claim, which in its legal analysis consists of a *profit à prendre*, including the right to exclusive possession and enjoyment of all the surface embraced within the lines of the land located by him as his claim.³ But, long before there was any national legislation on this subject, systems of local mining regulations, growing out of the necessities of the miners, had been established in the states and territories of the Rocky Mountains and the Pacific Slope, where discoveries of rich mineral deposits had brought together large bodies of prospectors. At a meeting of the miners themselves called for that purpose, the district rules and regulations were framed to fit the needs of each particular locality; and these soon became recognized as a part of the law of the community for which they were made.⁴ They were first

it provides that property shall not be interfered with for this purpose, unless so taken, or except by written consent of the owner, or of the commissioners of the land office when the land belongs to the state. As to the rights in general of grantees of mining privileges, see *Marvin v. Brewster Co.*, 55 N. Y. 538.

¹ In most of the charters from the British crown to the colonies, "all mines" were expressly included. In some of them, as in those of New England, there was a reservation of a fifth, or a fourth, of the gold and silver ore; and, subject to this reservation, mines were leased by the colonial governors to those who discovered them. 3 Dane, Abr. 137; 2 Wash. R. P. 5th ed. p. 407 (6th ed. § 1318), p. * 87.

² U. S. R. S. §§ 2318-2346; 23 Stat. L. 24; 26 Stat. L. 321, 1095. But from the operation of these statutes are expressly exempted Alabama, Kansas, Missouri, Minnesota, Michigan, Okla-

homa, and Wisconsin. U. S. R. S. § 2345; 19 Stat. L. 529; 22 Stat. L. 487; 26 Stat. L. 1026.

³ *Mannell v. Wulff*, 152 U. S. 505; *Sullivan v. I. S. M. Co.*, 143 U. S. 431; *Noyes v. Mantle*, 127 U. S. 348; *Gwillim v. Donnellan*, 115 U. S. 45; *Belk v. Meagher*, 104 U. S. 279; *Forbes v. Gracey*, 94 U. S. 762.

⁴ "The land department of the government, and this court also, have always acted upon the rule that all mineral locations were to be governed by the local rules and customs in force at the time of the location, when such location was made prior to the passage

developed in California; and its system, which was itself largely borrowed from the Spanish law, furnished the model upon which the systems of other sections were chiefly based.¹ In most of the states and territories, moreover, in which these public lands are situated, there are special legislative enactments, affecting to some extent their mining rights and interests. So that, in many mining districts, there are the provisions of the statutes of the United States, which as far as they go are paramount, the state or territorial legislation, which is second in order of authority, and the local rules and regulations enacted by the miners themselves, which are valid in so far as they are reasonable and do not conflict with the laws of congress, or of the state or territory.² Many mining district organizations, with their special codes of rules, were in existence at the time of the enactment of the national mining law of May 10, 1872, and that law expressly recognized them and authorized their continuance.³ The Federal law and the special miner's regulations apply only to operations for minerals on the public lands of the United States.⁴ The ordinary rules of the common law and the statutes of the respective states and territories define and ascertain the rights and duties of the proprietors of mineral lands which belong to individuals or corporations as private property.⁵

Under the United States statutes, the right beyond the acquisition of which most miners do not go is that of exclusive possession and a *profit à prendre* to take and appropriate the minerals. In acquiring these, the steps are: (a) discovery, (b) location, and (c) the performance of annual labor, commonly called "assessment work." If he desire to acquire complete title to the land itself, the claimant may make entry and purchase of it and then procure a patent from the United States. But there is no requirement that he shall take this last step.⁶ A few words as to each of these steps will suffice.

of any mineral law by congress." *Glacier Mt. S. M. Co. v. Willis*, 127 U. S. 471. See *Miner's Manual*, by Clark, Heltman & Consaul, pp. 18, 19; *Morrison's Mining Rights*, pp. 1-9.

¹ *Henshaw v. Clark*, 14 Cal. 460, 464; *Desloge v. Pearce*, 38 Mo. 588.

² *North Noonday M. Co. v. Orient M. Co.*, 1 Fed. Rep. 522; *Forbes v. Gracey*, 94 U. S. 762; *Upton v. Larkin*, 7 Mont. 449; *Territory v. Lee*, 2 Mont. 124; *Rosenthal v. Ives*, 2 Idaho, 244.

³ U. S. R. S. § 2324; *Min. Man. Clark, Heltman & Consaul*, p. 19.

⁴ U. S. R. S. § 2319; *Henshaw v. Clark*, 14 Cal. 460, 464.

⁵ *Henshaw v. Clark*, 14 Cal. 460, 464; 2 Wash. R. P. (6th ed. § 1319) p. *87.

⁶ U. S. R. S. §§ 2318-2346; *Min. Man. Clark, Heltman & Consaul*, p. 14. For summary of state requirements, see *Morrison's Mining Rights* (9th ed.), pp. 64-69.

§ 232. (a) **Discovery of Mines.**—The statute of the United States requires that, before the location of a mining claim, a discovery of valuable minerals in the land shall be made.¹ Many of the state and territorial enactments require the discoverer to sink a discovery shaft to indicate generally where his claim is to be located. And, if there be no positive requirement by statute, he must then proceed within a reasonable time to complete the location.² As a matter of practice, though the statutes are silent regarding it, the prospector should indicate his discovery by erecting a stake, or other convenient article, and posting a notice upon it, briefly describing his claim, demanding the time, if any, allowed by the state statute or the local mining rule for perfecting the location, and stating his name and the date.³

§ 233. (b) **Location of Mines.**—There are two distinct species of mines, with the location and claiming of which the statutes deal. One of these is the ordinary *lode* mine. A lode, in the geological sense, is “a fissure in the earth’s crust, an opening in its rocks and *strata* made by some force of nature, in which the mineral is deposited;” but, as used by the acts of congress, the term “is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.”⁴ The other form is

¹ Jackson v. Roby, 109 U. S. 440; Jupiter M. Co. v. Bodie Const. M. Co., 11 Fed. Rep. 666; Toulumne C. M. Co. v. Maier, 134 Cal. 583; Bryan v. McCaig, 10 Col. 309. “All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.” U. S. R. S. § 2319. The miner has a right, under this statute, to enter and prospect on public land of the United States, even though it is claimed by another as agricultural entry, provided the final

agricultural entry has not been made and he does not interfere with it for legitimate agricultural purposes nor damage the improvements of such other claimant. Lentz v. Victor, 17 Cal. 271; Clark v. Duval, 15 Cal. 85; McClintock v. Bryden, 5 Cal. 97; Atwood v. Fricot, 17 Cal. 37, 43.

² Electro-Magnetic Co. v. Van Auken, 11 Pac. Rep. 80; Erhardt v. Boaro, 113 U. S. 527; Patterson v. Hitchcock, 3 Col. 533; Murley v. Ennis, 2 Col. 300; Gleeson v. Martin White M. Co., 13 Nev. 442.

³ Min. Man. Clark, Heltman & Consaul, p. 27, q. v. This little book contains much practical and easily accessible information for miners.

⁴ I. S. M. Co. v. Cheesman, 116 U. S. 529; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522; Buffalo Z. & C. Co. v. Crump, 70 Ark. 525; Bainbridge on Mines, p. 2.

the *placer* mine. By the term placer claim is meant "ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits *not in place*, that is, not fixed in rock but which are in a loose state, and may in some cases be collected by washing or amalgamation without milling;" such as "superficial deposits which occupy the beds of ancient rivers or valleys;" also "deposits of valuable mineral, found in particles in alluvium or diluvium, or in the beds of streams."¹ When it is a *lode* (or vein) claim, the United States statutes permit each claimant to complete his location, when he is not limited by any prior, adverse rights, by staking off, or otherwise plainly marking out, a tract fifteen hundred feet long by six hundred feet wide.² Any markings upon the ground claimed, by which the boundaries may be readily traced, are sufficient.³ Each locator of a *placer* claim is restricted, by the United States statutes, to a plot of land not exceeding twenty acres in area, with the qualification that an association may locate twenty acres for each individual therein and that the maximum area of any one location shall be one hundred and sixty acres; and it is required that the lines of any placer claim shall correspond, as nearly as possible with the lines of the official government surveys, by which its public lands are laid out into townships and sections;⁴ and it is sufficiently definite to indicate the claim by describing it as some legal subdivision of such a section. In other respects (and, when the placer mine is not on land already surveyed, practically in all respects), the requirements as to locating both species of mines are the same.⁵ In locating either form of mine, a designation of more ground than is allowed by law is void only as to the excess.⁶

§ 234. (c) **Annual Labor on Mines.** — The United States statutes further provide that, on each claim located after May

¹ United States v. I. S. M. Co., 128 U. S. 673; Reynolds v. I. S. M. Co., 116 U. S. 687; Moxon v. Wilkinson, 2 Mont. 421; Min. Man. Clark, Heltman & Consaul, p. 33.

² U. S. R. S. § 2320.

³ Jupiter M. Co. v. Bodie Const. M. Co., 11 Fed. Rep. 666; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522; Walsh v. Erwin, 115 Fed. Rep. 531; Warnock v. DeWitt, 11 Utah, 324; Emerson v. McWhirter, 133 Cal.

510; Union M. & M. Co. v. Leitch, 24 Wash. 585; Min. Man. Clark, Heltman & Consaul, p. 28. Summary of states' requirements, Morrison's Mining Rights (9th ed.), pp. 64-69.

⁴ U. S. R. S. §§ 2329-2331.

⁵ See McKinley Creek M. Co. v. Alaska U. M. Co., 183 U. S. 563; Crane's Gulch M. Co. v. Scherrer, 134 Cal. 350.

⁶ Min. Man. Clark, Heltman & Consaul, pp. 33-37, and cases cited.

10, 1872, not less than one hundred dollars' worth of labor shall be performed, or improvements made, during each year; and, on all claims located before that time, ten dollars' worth per year for each one hundred feet in length along the vein.¹ Failure to perform such labor, or make such improvements, does not *per se* cause a forfeiture of the claim. But it makes it subject to relocation by others, if work be not resumed; and, if such relocation be made, forfeiture of the mining rights of the former claimant then results. The construction of the statute, in this respect, is that the rights of one locator are not divested by his failure to comply with this requirement of the act, unless there is some other locator for whose benefit the forfeiture occurs.²

The statute also authorizes the record of the locator's claim and interest, but does not require it for the preservation of his rights.³ It requires the locator to be a citizen of the United States, or one who has duly declared his intention to become a citizen, and outlines in detail the manner of establishing citizenship.⁴ When he has complied with all the requirements of the statute, and with the state and local laws and rules whose more minute provisions may be superadded, the locator of a mining claim has a *profit à prendre* in the privilege, and the exclusive right to the possession of the land. These rights combined, which constitute his claim, afford him more of the ordinary incidents of property than does the mere common-law privilege of taking minerals from the land of another, in that his mining claim is alienable, inheritable, devisable, and may be reached and taken from him by an execution. The *title* to the land remains in the United States, unless he takes the further steps which bring him a patent; but his right and interest constitute "property in the fullest sense of the word," and have incident

¹ U. S. R. S. § 2324. See Morrison's Mining Rights (9th ed.), pp. 72-87.

² Belk v. Meagher, 104 U. S. 279; Calhoun Gold M. Co. v. Ajax Gold M. Co., 182 U. S. 499; Clipper M. Co. v. Eli M. & L. Co., 29 Col. 377; North Noonday M. Co. v. Orient M. Co., 1 Fed. Rep. 522; Jupiter M. Co. v. Bodie Const. M. Co., 11 Fed. Rep. 666; Pharis v. Muldoon, 75 Cal. 284; DuPrat v. James, 65 Cal. 555; McGinnis v. Egbert, 8 Col. 41; Lacey v. Woodward, 25 Pac. Rep. 785; Heischler v. McKendricks, 16 Mont. 211. See Black v.

Elkhorn M. Co., 153 U. S. 445; Wright v. Killiam, 132 Cal. 56.

³ Buffalo Z. & C. Co. v. Crump, 70 Ark. 525; Payton v. Burns, 41 Oreg. 430.

⁴ U. S. R. S. §§ 2319, 2324; Min. Man. Clark, Heltman & Consaul, pp. 29-32. But the fact that the locator is an alien makes his claim not void, but only voidable; and no one but the government can successfully attack it on that ground. McKinley Creek M. Co. v. Alaska U. M. Co., 183 U. S. 563.

to them all the ordinary rights and duties of property ownership.¹ Thus, he may sue in ejectment or trespass, for a violation of his privileges,² and his interest requires a deed for its transfer.³ His rights carry with them the fullest and most important instance of a *profit à prendre* in this country.

If the locator go on and purchase the land itself in which the mine is located, the mining rights, of course, usually become extinguished or merged in the ownership of the corporeal property.

¹ Mannel v. Wulff, 152 U. S. 505; Sullivan v. I. S. M. Co., 143 U. S. 431; Forbes v. Gracey, 94 U. S. 762; State v. Moore, 12 Cal. 56, 71; McKeon v. Bisbee, 9 Cal. 137.

² Merced M. Co. v. Fremont, 7 Cal. 317, 326.

³ McCarron v. O'Connell, 7 Cal. 152. But see Black v. Elkhorn M. Co., 153 U. S. 445.

CHAPTER XIV.

LICENSES.

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| <p>§ 235. Definition and distinctions.</p> <p>§ 236. Express and implied licenses.</p> <p>§ 237. Licenses naked, and coupled with an interest.</p> <p>§ 238. Licenses executed, executory, continuously or repeatedly executed.</p> <p>§ 239. <i>a.</i> Licenses wholly executory — Revocation.</p> | <p>§ 240. <i>b.</i> Licenses wholly executed — Irrevocable.</p> <p>§ 241. <i>c.</i> Licenses continuously or repeatedly executed.</p> <p>§ 242. (a) On licensor's land.</p> <p>§ 243. (b) On licensee's land.</p> <p>§ 244. How licenses may be revoked.</p> |
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§ 235. **Definition and Distinctions.** — It has been shown how each of the incorporeal hereditaments discussed in the preceding chapters is a species of real property — an intangible interest, connected or associated with land or corporeal hereditaments. A license, on the other hand, is not *property* at all. It is a mere privilege or permission, which confers no interest in the land over which it exists. It is simply an excuse or justification for doing upon or in connection with another's land something which would otherwise constitute a trespass. Hence the ordinary definition of a license, in this sense, is "an authority to do a particular act or series of acts upon another's land, without possessing any estate therein."¹ "This distinction," says Chancellor Kent, "between a privilege or easement, carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a license which may be by parol, is quite subtle, and it becomes difficult in some of the cases to discern a substantial difference between

¹ Bouvier's L. Dict. "License"; 3 Kent's Com. p. *452; De Haro v. United States, 5 Wall. (U. S.) 599; Wolfe v. Frost, 4 Sand. Ch. (N. Y.) 72; Mumford v. Whitney, 15 Wend. (N. Y.) 380. A license is generally created by parol, but occasionally arises

by deed. But a privilege in land, when made in the latter way, is more commonly an easement, an enforceable right. To be a license, it must ordinarily be so formed that while executory it may be freely revoked at the option of the licensor.

them.”¹ The difficulty is in the application of a legal distinction which is in itself clear and unmistakable. An easement, a *profit à prendre*, or a servitude of any kind is an interest, a property right, owned and enforceable against the land. “A license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful.”² An ownership of a right of way over another’s field is an easement; and an enforceable right to dig and take away coal from his mine is a *profit à prendre*: but an oral permission to hunt on the land of one’s neighbor, or to prospect upon it for gold, which permission may be revoked at any time, is a license which while unrevoked justifies the act of prospecting or hunting. A license is a privilege which is personal to the licensee and can not be assigned.³ Not being property, its discussion here is logically out of place. But it is, at first sight, so similar to easements and servitudes, that it is generally treated of in connection with them. And the demand for completeness requires a brief examination of it at this point.

§ 236. **Express and Implied Licenses.** — One classification of licenses is into express and implied. The character and operation of the former kind depend, of course, upon the language employed in their creation. Implied licenses to go upon the property of others frequently arise from business or social relationships. People generally have a license to enter a post-office or other public building.⁴ Familiar intercourse between families may establish an implied permission for members of the one to pass over the lands of the other.⁵ “The publican,

¹ 3 Kent’s Com. p. *452.

² Thomas v. Sorrell, Vaughan’s Rep. 351. For further discussions of the nature of a license, see Greenwood Lake & Port Jervis R. Co. v. N. Y. & G. L. R. Co., 134 N. Y. 435; Cronkhite v. Cronkhite, 94 N. Y. 323; Mendenhall v. Klinck, 51 N. Y. 246; Hodgkins v. Farrington, 150 Mass. 19; Batchelder v. Hibbard, 58 N. H. 269; Motes v. Bates, 74 Ala. 374; Forbes v. Balenseifer, 74 Ill. 183; Parish v. Kaspere, 109 Ind. 586; Cook v. Chicago, B. & Q. R. Co., 40 Iowa, 451, 455; Wheeler v. West, 71 Cal. 126.

³ Prince v. Case, 10 Conn. 375; Dark v. Johnston, 55 Pa. St. 164; Mendenhall v. Klinck, 51 N. Y. 246; Emerson

v. Fisk, 6 Me. 200; Cowles v. Kidder, 24 N. H. 364; Nunnally v. Southern Iron Co., 94 Tenn. 397; Thoemke v. Fiedler, 91 Wis. 386. It has been said that a license may be made assignable by express permission, as where it was expressly declared by the parties that a license to mine might be transferred by deed. Muskett v. Hill, 5 Bing. N. C. 694. But such a right appears to have sufficient permanency to become in reality a *profit à prendre*.

⁴ Sterling v. Warden, 51 N. H. 217, 231.

⁵ Martin v. Houghton, 45 Barb. (N. Y.) 258; Adams v. Freeman, 12 Johns. (N. Y.) 408.

the miller, the broker, the banker, the wharfinger, the artisan, or any professional man whatever licenses the public to enter his place of business, in order to attract custom; but when the business is discontinued the license is at an end.”¹ So, if any one sell personal property upon his land to another, he impliedly licenses the latter to enter and remove that which he has bought.²

§ 237. **Licenses naked, and coupled with an Interest.** — Another and distinct classification of licenses is into those that are naked, or “*mere licenses*,” and those that are coupled with an interest, that is, coupled with an ownership of some interest in the land or of something that is in or on the land. The importance of this distinction arises from the fact that the latter kind of license, whether it be executory or executed, is irrevocable by the licensor alone; while the former kind may often be revoked merely at his option.³ The following and chief portion of this chapter is devoted to a discussion of the revocability of naked licenses. But it is to be here emphasized that any license is irrevocable, except with the concurrence of the licensee, when it is annexed to a valid ownership of property on the land in connection with which it exists.⁴ And a familiar illustration of this general rule emerges when one sells personal chattels on his own land, and the purchaser thereby acquires an enforceable license to enter upon it and remove them within a reasonable time after the sale.⁵

§ 238. **Licenses wholly executory, wholly executed, and continuously or repeatedly executed.** — The most prominent and important classification commonly made of licenses is into executory and executed. In connection with the forms of them,

¹ *Gowen v. Phila. Exch. Co.*, 5 Watts & S. (Pa.) 141, 143; *Root v. The Commonwealth*, 98 Pa. St. 170; *Kay v. Pa. R. Co.*, 65 Pa. St. 273.

² *Wood v. Leadbitter*, 13 M. & W. 838, 856; *Whitmarsh v. Walker*, 1 Met. (Mass.) 313, 316; *Parsons v. Camp*, 11 Conn. 525.

³ *Wood v. Leadbitter*, 13 M. & W. 838, 856; *Wood v. Manley*, 11 Adol. & El. 34; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174, 203; *United States v. Balt. & O. R. Co.*, 1 Hughes (Ky.), 138; *Metcalf v. Hart*, 3 Wyo. 513; *Kamphouse v. Gaffner*, 73 Ill. 453, 461; *Miller v. The State*, 39 Ind. 267; *Richmond R.*

Co. v. Durham & N. R. Co., 104 N. C. 658.

⁴ *Ibid.*

⁵ *Whitmarsh v. Walker*, 1 Met. (Mass.) 313, 316; *Nettleton v. Siker*, 8 Met. (Mass.) 34; *Hill v. Hill*, 113 Mass. 103; *Parsons v. Camp*, 11 Conn. 525; *Thomas v. Sorrell*, Vaughan, 330, 351; *Marshall v. Green*, L. R. 1 C. P. Div. 35. See *Williams v. Morris*, 8 M. & W. 488; *Town v. Hazen*, 51 N. H. 596; *Giles v. Simonds*, 15 Gray (Mass.), 441; *Pierrepont v. Barnard*, 6 N. Y. 279; *Cool v. Peters B. & L. Co* 87 Ind. 531.

which thus emerge, arise the most difficult questions as to their revocability by the licensor alone.¹ It is apparent, also, upon a moment's reflection, that, when licenses are considered from this standpoint, an intermediate class must exist in which the controversies have arisen when the licenses were partly executed and partly executory. An illustration of this class is presented by the above-cited leading case of *Wood v. Lead-bitter*,² in which permission to cut down and take away a designated number of trees was sought to be revoked by the licensor after a portion of them had been severed from the stumps and were lying where they fell and the residue still remained standing. Another illustration would be an orally given privilege of erecting and living in a house upon another's land.³ It will be found to conduce to clearness of thought and exposition to consider such instances as these as a group by themselves, and, accordingly, to discuss the revocability of licenses, *a*, wholly executory, *b*, wholly executed, and, *c*, continuously or repeatedly executed.

§ 239. *a. Licenses wholly Executory — Revocation.* — A license is wholly executory as long as nothing of that which it authorizes has been done upon or affecting the land with reference to which it was given.⁴ A license to cut certain trees is executory while none of them has been cut; and a license to flow a designated piece of land is executory until, pursuant to such authority, water has been actually flowed upon that specific land. And this is true although the licensee may have performed much labor elsewhere and expended large sums of money in preparing to act on the license; as if, for example, he has erected a dam on his own adjoining property, for the purpose of flowing the water back upon the land of the licensor.⁵ The law is thoroughly settled everywhere, that a license of this kind, — wholly executory, — whether it authorize the act or acts to be performed upon the land of the licensor or upon that of the licensee, may be revoked at the pleasure of the licensor, if the licensee has not expended money nor otherwise mate-

¹ The licensee alone may, at any time, release or abandon his privilege. *Dark v. Johnston*, 55 Pa. St. 164.

² 13 M. & W. 838. See note on licenses, 49 Lawy. Rep. Ann. 497.

³ *Jamieson v. Millemann*, 3 Duer (N. Y.), 255; *Jackson v. Babcock*, 4 Johns. (N. Y.) 418; *Prince v. Case*, 10 Conn. 375, 378.

⁴ *Hill v. Hill*, 113 Mass. 103; *Dodge v. McClintock*, 47 N. H. 383; *Houston v. Laffee*, 46 N. H. 505.

⁵ *Thompson v. Gregory*, 4 Johns. (N. Y.) 81; *Hazleton v. Putnam*, 4 Chand. (Wis.) 117; *Carleton v. Redington*, 21 N. H. 291, 293; *Woodward v. Seeley*, 11 Ill. 157, 165.

rially changed his position upon the faith of such license; i. e., if its abolition will leave the licensee in *statu quo*.¹ And a large majority of the best courts go far beyond this, and hold that such a license is freely revocable by the licensor alone, although the other party may have paid value for it, or, in reliance upon it, may have expended large sums of money or in other ways substantially altered his position.² In the states in which this view prevails, both the courts of law and those of equity sustain it, and refuse to fasten any liability upon the licensor for his act of revocation, on the clear, just principle that to hold otherwise would be, as was said in New York, to allow a mere parol license or oral privilege to create a valid easement or other incorporeal hereditament, thus not only in effect repealing the statute of frauds, but also abolishing the rule of the common law that such an interest in or over land can only be conveyed by a deed.³ In the New Jersey Court of Errors and Appeals, the true and forcible argument for the rule was stated by Chief Justice Beasley as follows: "If a parol license, inefficacious by force of the act, should be rendered efficacious by reason of a losing performance on the side of the licensee, it would be difficult to refuse, on a like ground, to apply a similar quality to a sale of goods equally within the statutory condemnation. . . . The fact is, that a statute which renders legal the revocation of certain classes of contracts is founded on the theory that while, by its force, great losses will

¹ Wood v. Leadbitter, 13 M. & W. 838; Sampson v. Burnside, 13 N. H. 264; Huff v. McCauley, 53 Pa. St. 206; Root v. Wadhams, 107 N. Y. 384; Lawrence v. Springer, 49 N. J. Eq. 289; Parish v. Kaspere, 109 Ind. 586.

² Foot v. New Haven & North Co., 23 Conn. 214, 223; Thompson v. Gregory, 4 Johns. (N. Y.) 81; Babcock v. Utter, 1 Abb. Ct. App. Dec. (N. Y.) 27, 60; Crosdale v. Lanigan, 129 N. Y. 604; White v. Manhattan R. Co., 139 N. Y. 19; Lawrence v. Springer, 49 N. J. Eq. 289; Morse v. Copeland, 2 Gray (Mass.), 302; Cook v. Stearns, 11 Mass. 533; Seidensparger v. Spear, 17 Me. 123; Foster v. Browning, 4 R. I. 47, 53; Batchelder v. Hibbard, 58 N. H. 269; Prince v. Case, 10 Conn. 375; Collins Co. v. Marcy, 25 Conn. 239; Jackson & S. Co. v. Phila. W. & B. R. Co., 4 Del. Ch. 180; Carter v. Harlan, 6

Md. 20; Wood v. M. A. L. R. Co., 90 Mich. 334; Lake Erie R. R. v. Kenersly, 132 Ind. 274; St. Louis Nat. Stock Yards v. Wiggins Ferry Co., 112 Ill. 384; Minneapolis Mill Co. v. Minn. & St. Louis R. Co., 51 Minn. 304; Pitzzman v. Boyce, 111 Mo. 387; Thoenke v. Fiedler, 91 Wis. 386; Beck v. L. N. O. & T. R. Co., 65 Miss. 172; Stewart v. Stevens, 10 Colo. 440; Duke of Sutherland v. Heathcote (1892), 1 Ch. 475. In some of these cases, the license had been partly executed; but the decision was that, in so far as it was *executory* it was revocable, and hence they are authority for the proposition for which they are cited.

³ Wolfe v. Frost, 4 Sand. Ch. (N. Y.) 72, 90; White v. Manhattan R. Co., 139 N. Y. 19; Cronkhite v. Cronkhite, 94 N. Y. 323.

many times fall upon promisees, nevertheless such losses must be endured by such sufferers in order that the mass of the community shall be protected against worse disaster."¹ With the statute of frauds before him, it is the licensee's own folly that he performs labor or incurs expense on the strength of a parol agreement for a right or interest in the land of his neighbor. He is not justified, as a reasonable person, in relying on such a contract; and, therefore, he is not in legal contemplation defrauded when the permission is annulled by the other party.² But, when the licensor has been guilty of conduct such that the revocation of the license would otherwise act as a fraud on the promisee, as when he has made false statements or misrepresentations, other than the promise of the license, which have induced the licensee substantially to change his position, then all the courts are agreed that the license can not be revoked, or at least that it can not be done away with unless the licensee is fully reimbursed or placed in *statu quo*.³ In other words, the principle of the revocability of executory licenses is a rule, not to shield fraud, but in favor of the statute of frauds.⁴

It was early decided in Pennsylvania, however, and the principle has been steadily adhered to there and followed in a few other states, such as Georgia, Iowa, Nevada, Tennessee, and Texas, that an executory license becomes irrevocable and in effect transfers an interest in or over the land, by the fact that, in reliance upon the parol promise, the licensee has expended money, or performed labor, and will suffer consequential injury if the license be abrogated.⁵ This is the extreme, so-called equitable view, which subordinates the requirements of the statute of frauds to the apparent demands of the individual case. It is defended by the argument that the

¹ *Lawrence v. Springer*, 49 N. J. Eq. 289, 296.

² *Wood v. Leadbitter*, 13 M. & W. 838; *Crosdale v. Lanigan*, 129 N. Y. 604, 610; *Desloge v. Pearce*, 38 Mo. 588, 599.

³ *Minneapolis Mill Co. v. Minn. & St. L. R. Co.*, 51 Minn. 304, 313; *Eckerson v. Crippen*, 110 N. Y. 585; *Cronkhite v. Cronkhite*, 94 N. Y. 323, 327; *Wiseman v. Lucksinger*, 84 N. Y. 31.

⁴ *Crosdale v. Lanigan*, 129 N. Y. 604, 610; *Lawrence v. Springer*, 49 N. J. Eq. 289, 296.

⁵ *Le Fevre v. Le Fevre*, 4 Serg. & R. (Pa.) 241, 267; *Dark v. Johnston*, 55 Pa. St. 164; *Cleland's App.*, 133 Pa. St. 189; *Winham v. McGuire*, 51 Ga. 578; *Hiers v. Mill Haven Co.*, 113 Ga. 1002; *Harkness v. Burton*, 39 Iowa, 101; *Lee v. McLeod*, 12 Nev. 280; *Moses v. Sanford*, 2 Lea (Tenn.), 655; *Thomas v. Junction City Irrigation Co.*, 80 Tex. 550; *Clark v. Glidden*, 60 Vt. 702; *Gilmore v. Armstrong*, 48 Neb. 92; *Flickinger v. Shaw*, 87 Cal. 126.

licensee, by so changing his position, becomes practically a purchaser of the license for a valuable consideration, "and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived."¹ Thus, where the owner of a lot of land had made expensive improvements upon it, on the faith of a mutual understanding that he might use an alley on his neighbor's lot, it was held that he had an irrevocable license for the enjoyment of a way over the alley.² And where two owners had agreed in erecting their houses, on their respective lots, so that one could not reach the upper stories of his house except through a portion of the other's building, it was decided that an irrevocable right of access was thus created.³ In a few of the states this view is adopted by the courts of equity, while rejected by the common-law courts.⁴ But the New York Court of Appeals effectually answers the arguments in favor of making such licenses, merely as such, irrevocable, either in law or in equity, and sustains the opposite rule of England and most of the United States, as follows: "This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable. But to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite a different matter."⁵

§ 240. *b. Licenses wholly executed — Irrevocable.* — The statute of frauds does not apply to a license which has been completely carried out and performed. Whether it was given by deed or by oral contract, the execution of it before it is revoked makes it an accomplished act, performed with the valid consent of both parties, to which no statutory prohibition

¹ *Rerick v. Kern*, 14 Serg. & R. (Pa.) 267, 271; *Le Fevre v. Le Fevre*, 4 Serg. & R. (Pa.) 241.

² *Ebner v. Stickter*, 19 Pa. St. 19.

³ *Cleland's App.*, 133 Pa. St. 189.

⁴ *Kamphouse v. Gaffner*, 73 Ill. 453, 461; *Tanner v. Valentine*, 75 Ill. 624; *Johnson v. Skillman*, 29 Ind. 95; *Pit-*

man v. Poor, 38 Me. 237; *Cook v. Prigden*, 45 Ga. 331. See *Babcock v. Utter*, 1 Abb. Ct. App. Dec. (N. Y.) 27-60; *Wiseman v. Lucksinger*, 84 N. Y. 31.

⁵ *Crosdale v. Lanigan*, 129 N. Y. 604, 610.

can thereafter apply.¹ It is, moreover, a complete excuse and justification to the licensee for what he has done by virtue of its authority. And that is what is meant by the settled rule of law that a wholly executed license is irrevocable; having permitted the act or acts to be done without objection, the licensor can not annul or recall his parol permission so as to hold the licensee as a trespasser.² Thus, if one by license of another, pull down an existing building on the latter's land, or dig and lay an aqueduct in his lot, or cut down and remove trees from his forest, no action will lie for such proceedings, no matter how much the licensor may have been injured thereby.³

§ 241. *c. Licenses continuously or repeatedly executed.*— Many questions have been presented to the courts as to licenses partly executed and partly executory; such, for example, as a permission to flow water unto another's land and to retain it there, or to build a house upon his property and to continue to live in it indefinitely. The same kind of question is presented also by an authority to do several distinct acts on land of another, when some of them have been performed and others are still unexecuted. Unfortunately, some of the highest courts and best writers have spoken of such licenses as these as "executed,"⁴ while others have dealt with them under the simple designation "executory."⁵ They are not entirely within either of those classes. They can be most intelligibly explained, as a class or group by themselves, as *continuously or repeatedly executed* licenses. Our discussion of them falls naturally and logically into two divisions, namely: (a) those continuously or repeatedly executed licenses the performance of which is to take place on the licensor's land, and (b) those continuously or repeatedly executed licenses the performance of which is to take place on the licensee's land.

¹ Taylor v. Waters, 7 Taunt. 374; Woodbury v. Parsley, 7 N. H. 237; Wal-ter v. Post, 6 Duer (N. Y.), 363.

² Selden v. Del. Canal Co., 29 N. Y. 634, 639; Pratt v. Ogden, 34 N. Y. 20; Cook v. Stearns, 11 Mass. 533; Foot v. New Haven & North Co., 23 Conn. 214; Barnes v. Barnes, 6 Vt. 388; Sampson v. Burnside, 13 N. H. 264; Wood v. Leadbitter, 13 M. & W. 838; Smith v. Goulding, 6 Cush. (Mass.) 154.

³ Prince v. Case, 10 Conn. 375, 378; Pratt v. Ogden, 34 N. Y. 20; Sampson v. Burnside, 13 N. H. 264; Kent v.

Kent, 18 Pick. (Mass.) 569; Fentiman v. Smith, 4 East, 107; Bridges v. Pur-cell, 1 Dev. & B. (N. C.) 492, 496.

⁴ Crosdale v. Lanigan, 129 N. Y. 604, 610; Wolfe v. Frost, 4 Sand. Ch. (N. Y.) 72, 90; Cleland's App., 133 Pa. St. 189; 2 Wash. R. P. (5th ed.) p. 667 (6th ed. § 844), p. *400; Jones, Ease, § 77, *et seq.*

⁵ Dodge v. McClintock, 47 N. H. 383; Hill v. Hill, 113 Mass. 103; Het-field v. Cent. R. Co., 29 N. J. L. 571; Lawrence v. Springer, 49 N. J. Eq. 289.

§ 242 (a) **Licenses to be continuously or repeatedly executed on the Licensor's Land.** — The first of these — the license to be continuously or repeatedly executed on the licensor's land — may be easily and fully treated by being considered as in effect two licenses; the one wholly executed, embracing that part which has been already performed and therefore governed by the principles discussed in section 239 above; the other executory, embracing the other portion and governed by the principles discussed in section 240 above. It follows that such a license is a complete excuse and justification for what has been done pursuant to it before its revocation;¹ that, by the great weight of authority the licensor who has not been guilty of fraud or unfair dealing respecting it may at any time revoke it as to the future and stop further operations under it, no matter how much injury such revocation may cause the licensee,² and that, according to the Pennsylvania doctrine, it has become entirely irrevocable after the licensee has so altered his position upon the faith of it as not to be left substantially *in statu quo* upon the abrogation of the license.³ Thus, under the majority rule, it has been held that a verbal license given to an adjacent proprietor to erect and use a retaining wall upon the licensor's land might be revoked after the wall was erected, and the licensee might be compelled to remove the wall.⁴ But the latter was not liable in damages for having placed it there. And in another case, where the permission was to build a dam on the licensor's land, it was decided that the landowner might at any time compel the removal of the dam from his property, and that its owner was not liable in damages for having built and retained it there nor for its affecting the land during the reasonable time required for its removal after the license was revoked.⁵ But, in applying the Pennsylvania doctrine, it was adjudged that an oral authority to cast sawdust into a stream was wholly irrevocable after the licensee had been led thereby to build his mill in a location different from that which he had originally intended;⁶ and a license to sink

¹ § 240, *supra*.

² § 239, *supra*; *Hicks v. Swift Creek Mill Co.*, 133 Ala. 411; *Emerson v. Shores*, 95 Me. 237.

³ *Ibid*.

⁴ *Crosdale v. Lanigan*, 129 N. Y. 604; *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384.

⁵ *Smith v. Goulding*, 6 Cush. (Mass.)

154. Also *Cook v. Stearns*, 11 Mass. 533; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; *White v. Manhattan R. Co.*, 139 N. Y. 19; *Lawrence v. Springer*, 49 N. J. Eq. 289; *Batchelder v. Hibbard*, 58 N. H. 269; *Wood v. Mich. Air Line R. Co.*, 90 Mich. 334.

⁶ *Thompson v. McElarney*, 82 Pa. St. 174.

and retain a shaft for mines in the licensor's land was held to be irrevocable after the shaft had been made.¹ It was in deciding a case similar to these last two, that the New York Court of Appeals said: "It is better, we think, that the law requiring interests in land to be evidenced by deed should be observed, than to leave it to the chancellor to construe an executed license" (the license was partly executed) "as a grant depending upon what, in his view, may be equity in the special case."²

§ 243. (b) **Licenses to be continuously or repeatedly executed on the Licensee's Land.**—A license to be executed upon the licensee's land can exist only in those cases in which its performance will destroy or impair some right owned by the licensor over that land. For, in the absence of such an adverse right, one may do what he pleases on his property without the necessity for any license. Thus, if one have an easement to enjoy for his house light and air over the adjacent lot, such a license may arise in the form of a permission to his neighbor to so build as to shut out such light and air and retain his building in that position. As soon as a license of this nature is either wholly executed, or partly executed by a material change of position on the part of the licensee, it becomes *entirely* irrevocable.³ For the effect of enforcing it is not to *create* or *convey*

¹ Beatty v. Gregory, 17 Iowa, 114. Also Wickersham v. Orr, 9 Iowa, 253, 260; Lee v. McLeod, 12 Nev. 280; § 239, *supra*. Under either of the opposing rules, a license may be revoked by the licensor after practically all the beneficial purposes of its creation have been enjoyed by the licensee. Allen v. Fiske, 42 Vt. 462; Clark v. Glidden, 60 Vt. 702, 710.

² Crosdale v. Lanigan, 129 N. Y. 604, 610. The word "executed," as used in the passage quoted, is explained by the context. It is not meant here to criticize the high tribunal from whose language the quotation is taken; but rather to make the text of this treatise plain. The license, in that case, was an oral permission to build a retaining wall on another's land, and, before the license was attempted to be revoked, the wall had been entirely erected. In a true and literal sense, therefore, the license was executed. It is perfectly clear, however, that the parties to the agreement meant it to include the right to

maintain the wall, for at least a reasonable time after it was finished; for otherwise it would be of no use to the licensee. It was this last named part, this distinctly implied part of the license, that was in reality revoked. The *right to build* was not revoked; for, if that could have been done, the licensor might have sued the licensee and recovered against him in an action for trespass. The *privilege of keeping the wall there in the future*, and that alone, was revoked. It was, in a sense, an "executed" license; but there was a distinct part of it that was *executory*, and the executory part alone was revocable. It is believed that a correct understanding of the sense in which the courts have used the terms "executed" and "executory," in treating of the law of licenses, would clarify many opinions and do away with many apparent discrepancies.

³ Winter v. Brockwell, 8 East, 308; Hewline v. Shippam, 5 B. & C. 221; Moore v. Rawson, 3 B. & C. 332; Morse v. Copeland, 2 Gray (Mass.), 302; Pope

any right or interest in real property, but to *destroy* an existing easement or servitude: and, therefore, the doctrine of equitable estoppel may be applied without in any way contravening the statute of frauds. The impairment or destruction of incorporeal hereditaments is not affected by the statute of frauds, nor by the common-law rule which requires certain interests in real property to be conveyed by deed.¹

§ 244. **How Licenses may be revoked.** — A revocable license may be revoked and terminated by any act of the licensor which prevents, or is inconsistent with, its exercise.² It is revoked by his death, or by his conveyance of the land without excepting or preserving the right, or by the death of the licensee.³ So an action by the landowner against the licensee, for the recovery of damages for its exercise, brings it to an end.⁴

v. O'Hara, 48 N. Y. 446; *Jamieson v. Millimaun*, 3 Duer (N. Y.), 255; *Veghte v. Raritan Co.*, 19 N. J. Eq. 142, 153; *Foot v. New Haven & North Co.*, 23 Conn. 214, 223; *Addison v. Hack*, 2 Gill (Md.), 221; *Hazleton v. Putnam*, 3 Chand. (Wis.) 117, 124.

¹ *Ibid.*; *Wolfe v. Frost*, 4 Sand. Ch. (N. Y.) 72, 90; *Wood v. Leadbitter*, 13 M. & W. 838.

² *Hodgkins v. Farrington*, 150 Mass. 19, 21; *East Jersey Iron Co. v. Wright*,

32 N. J. Eq. 248; *Winne v. Ulster Co. Sav. Inst.*, 37 Hun (N. Y.), 349.

³ *Wood v. Leadbitter*, 13 M. & W. 838; *De Haro v. United States*, 5 Wall. (U. S.) 599; *Emerson v. Shores*, 95 Me. 237; *Eckert v. Peters*, 55 N. J. Eq. 379; *Vandenburgh v. Van Burgen*, 13 Johns. (N. Y.) 212.

⁴ *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; *Branch v. Doane*, 17 Conn. 412.

BOOK II.
HOLDINGS OF REAL PROPERTY.

PART I. — ALODIAL HOLDING BEFORE FEUDAL SYSTEM, AND
AFTER REVOLUTION IN UNITED STATES.

PART II. — TENURE — FEUDAL SYSTEM.

PART I.

ALODIAL HOLDING.

CHAPTER XV.

OUTLINE OF THIS BOOK — ANGLO-SAXON HOLDINGS.

§ 245. Introduction — Divisions.	§ 247. Forms of Anglo-Saxon
§ 246. Anglo-Saxon and American holdings.	holdings.
	§ 248. Feudal germs in Anglo-Saxon law.

§ 245. **Introduction — Divisions.** — The forms or kinds of real property having been examined and explained, the next department of our subject is a discussion of the different methods by which they may be held or owned. This will involve historical matter, which is sometimes said to be of little or no importance to the American lawyer. But, in addition to its lending the satisfaction, and utility alike, which thoroughness merely for its own sake brings with the work of every student, a knowledge of the ancient tenures and holdings affords a constant source of enlightenment and assistance in the study of the subsequent and more directly practical portions of real-property law. There are many statutes and forms of modern law that may be largely understood and often applied by him who has no knowledge whence they came. Those who are to know them fully, however, and desire to be able to use them to the best advantage, must frequently go to their beginnings and trace them from their sources. To observe the salient elements of real-property law, as they arose and grew in England during the Anglo-Saxon period; to investigate the important changes and additions, which came about as the result of the Norman Conquest and the vigorous sway of the feudal system; to note the decline of that system, its rejection in America and the restoration here of land holding

to substantially its primitive form, and ultimately to find scattered along through it all the mainsprings of hundreds of leading principles, which are at the basis of this and other great departments of jurisprudence on both sides of the Atlantic, is not merely the work of an antiquarian; it is an absolute necessity to the thorough equipment of a practical American lawyer. The effort is made in this book to present, in as terse a form as is compatible with clearness, the historical matter which explains our holdings of real property and shows the origin and nature of important rules and principles of other branches of the subject. This will be attempted in three chapters, the *first*, or present one, of which deals with Anglo-Saxon holdings, the *second* with the feudal system, and the *third* with holdings in the United States. How the tenure of the county of Kent supplied a natural connection between the holdings to be discussed in the first and third of these chapters is hereafter explained.¹ With that link—or rather chain five centuries long—between them, those holdings are, nevertheless, largely identical; and the chapters which deal with them, though separated by that on the feudal system (which is Part II.), are logically to be thought of together as constituting Part I. of this Book.

§ 246. **Anglo-Saxon and American Holdings.**—There is very little actual knowledge, at the present time, of the system, if there were anything at all that could be called a system, under which land was held by the Teutonic invaders—the Angles, the Saxons, and the Jutes—who wrested England from the Celtic and British tribes and founded the kingdom of Great Britain. There is a similar lack of information as to many of their laws and institutions, which prevailed even down to the Norman Conquest. It is certain, however, that, during the Anglo-Saxon period of English history, much real property was owned and held alodially, that is, “held in absolute ownership, not in dependence upon any other body or person in whom the proprietary rights were supposed to reside, or to whom the possessor of the land was bound to render service.”² An ordinary kind of landed interest was that of such absolute dominion and control, each owner being the entire master of his property, independent of all obligations to render services or

¹ § 246, *infra*.

² Digby, *Hist. Law R. P.* (5th ed.) p. 12; 2 Blackst. *Com.* p. *105; 3

Kent's *Com.* p. *488; Freeman, *Norman Conq.* (2d ed.) i. 84.

money payments to any one, except only the three requirements, the *trinoda necessitas*, to which all lands were subject. These were the obligations to render military services for the king (*expeditio*), and to repair bridges, and fortresses (*pontis arcisve constructio*), and were of a political rather than of a proprietary nature.¹ After the Norman Conquest and the general burdening of lands in England with feudal requirements, the Kentishmen struggled persistently, and with a large amount of success (though their lands were brought under the feudal system), for the preservation of this alodial characteristic of their real-property holdings.² And, in the royal charters to most of the American colonies, in after times, reference was made to the holding of lands in the county of Kent, and the same immunities that those lands enjoyed from many of the feudal burdens were assured for the realty here.³ Thus, the county of Kent formed, as it were, a bridge, over feudal eras, between the alodial holdings of our Anglo-Saxon ancestors and the same form of real-property ownership now almost universally prevalent in the United States.⁴

§ 247. **Forms of Anglo-Saxon Holdings.** — The alodial lands of the Saxons were practically co-extensive with their *book-lands* (*boc-land*), or those which had originally been "booked," or granted, by the king and his council of wise men (*witenagemot* or *witan*), from the common property of the community, to individuals or religious bodies.⁵ The characteristics of such grants depended largely, of course, upon the terms of the charters, or "*books*," by which they were made; but these lands were generally, not only held alodially, but also with the right of the owners to will them away, or transfer them to others by act *inter vivos*. They were also inheritable, and, in the absence of special local custom, passed, on the death of the owner intestate, to all of his sons in equal shares.⁶ Another

¹ 1 Stubb's Const. Hist. Eng. pp. 76, 190; Digby, Hist. Law R. P. (5th ed.) p. 13; 1 Blackst. Com., p. *263.

² 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 186; 1 Wash. R. P. p. *17, 6th ed., § 55.

³ 1 Spence, Eq. Jur. 105, n.; 1 Story, Const. 159. An ordinary expression in those charters, describing the tenure, was: "to be holden of our sovereign lord the king as of his manor of East Greenwich in the county of Kent in the realm of England, in free and common

socage, and not in *capite* or by knight-service."

⁴ § 288, *infra*.

⁵ Digby, Hist. Law R. P. (5th ed.) p. 12.

⁶ Digby, Hist. Law R. P. (5th ed.) p. 26; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 60, where it is also said: "It is important to remember that book-land was a clerkly and exotic institution, and that grants of it owe their existence directly or indirectly to royal favor, and throw no light, save incidentally, on the old customary rules of land-holding."

large portion of the land was called *folk-land*, which was held by virtue of the customary law of the realm, without any written title. It is probable that this kind of property, coming down as it did by custom from ancestor to heir, could not be aliened from the family (or folks) without much difficulty, and there seems to be no evidence that it could be disposed of by will.¹ Large tracts of territory, called *terra regis*, were also held by the king individually. These came, in process of time, to be known as the king's folk-land; and it was, without doubt, the great extent and importance of this domain, with the frequent additions to it from forfeiture and other causes, that ultimately gave emphasis, if not origin, to the fundamental conception of the English feudal system, that all real property was originally vested in the crown.² In the latter part of the Anglo-Saxon period, land was sometimes let out by the owner, to be held of him by another; and it was then styled *laen-land*. It is probable that this arrangement was most frequently made to continue during the life of the holder, though it may sometimes have been for one or more years or even a shorter period.³ Here was the precursor, if not the original, of the relation of landlord and tenant of subsequent centuries.⁴

§ 248. **Feudal Germs in Anglo-Saxon Law.**—It is said by the most recent and careful historians that, toward the close of the Anglo-Saxon era, there are discernible in these forms of land holding the germs and some of the growth of that which was hastened by the Norman Conquest into the fully developed feudal system. There was present the relation of lord and man (closely corresponding originally to the Roman *princeps* and *comes*), and this had in some instances developed into the relation of lord and tenant. Large districts of land were held by great men, such as the kings *thegns*, or by religious institutions, and divided, parcelled out, and controlled by a system similar to that which characterized the manors of the succeeding centuries.⁵ And, at the time of the arrival of William the Conqueror, there were many tillers of the soil, who owed and rendered to superior owners of the land services substantially the same as those which were afterwards incident to the rela-

¹ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 61, 62.

² Digby, Hist. Law R. P. (5th ed.) pp. 17, 18.

³ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 61; 1 Kemble, Saxons in Eng.

p. 310; Digby, Hist. Law R. P. (5th ed.) p. 16.

⁴ Digby, Hist. Law R. P. (5th ed.) pp. 49, 50.

⁵ Digby, Hist. Law R. P. (5th ed.) pp. 19–25.

tion of lord and vassal.¹ "After the Norman Conquest book-land preserved its name for a time in some cases, but was finally merged in the feudal tenures in the course of the twelfth century. The relations of a grantee of book-land to those who held under him were doubtless tending for some considerable time before the Conquest to be practically very like those of a feudal superior; but Anglo-Saxon law had not reached the point of expressing the fact in any formal way. The Anglo-Saxon and the continental modes of conveyance and classification of tenures must have coalesced sooner or later. But the Conquest suddenly bridged a gap which at the time was still well marked. After its work is done we find several new lines of division introduced and some old ones obliterated, while all those that are recognized are deeper and stronger than before. The king's lordship and the hands that gather the king's dues are everywhere; and where they have come the king's law will soon follow."²

¹ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 61.

² 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 62, 63.

PART II.

TENURE.

CHAPTER XVI.

THE FEUDAL SYSTEM AND ITS FRUITS.

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The Feudal System.

§ 249. **Rise and Growth of the Feudal System in England.**—Feudalism would have conquered England, even if the Normans had never come. With William I. both conquests were completed quickly. In forms widely divergent in the different countries, the feudal system, which Maine says created a great interruption in the history of jurisprudence,¹ had grown and matured upon the continent much earlier than in the British Isles,—probably because, in all of its phases, it resulted from a coalescence of Teutonic customs and Roman practices, which went on most rapidly where the more cultured and civilized peoples of the remnants of the Western Empire had the greatest influence upon their ruder but stronger northern conquerors.² For at least a century before their taking of England in 1066, the Normans had practised the system of military tenure of lands and enjoyed the services of a body of trained lawyers, skilled in all the subtle reasoning and finesse of the feudal polity.³ These they naturally brought with them to their new dominion. And the full-grown system of the victorious race, converging with the then incipient feudal land tenure of the vanquished, rapidly produced the Anglo-feudalism which has played such a tremendous part in the development of the common law of real property. It would no doubt be erroneous to assume that feudal tenure and its numerous burdens were imposed at any one time upon all the land in England by the fiat of William the Conqueror, powerful ruler though he was, who would brook no *imperium in imperio*; or that it was only by the combination of the two forms of landed proprietorship, existing apart before the battle of Hastings, that there was brought into being, in those troublous times, the English characteristics of the holdings of land from and under a superior owner or lord. Numerous forces, personal, economical, and

¹ Maine's Ancient Law (1st Amer. ed.), p. 15.

² Maine's Anc. Law (1st Amer. ed.),

pp. 286–294; Digby, Hist. Law R. P. ch. i. § ii. (pp. 30, 31).

³ Cruise Dig. ch. i. §§ 8–12; 1 Poll & Mait. Hist. Eng. Law, cd. iii.

political, were there working to make history and institutions rapidly, yet with a permanency which shows the absence of haste.¹ Early in the twelfth century the task had been substantially performed, and practically all the land of England was under the dominion of feudal masters and overlords.² Even earlier than this, during the twentieth year of the reign of William I., he had succeeded in having the domains of many of the Saxon proprietors, who had escaped the sword and the forfeiture of their lands, surrendered to him as feudal lord and then handed back to their owners to be held of him; and when to these acquisitions were added the vast estates which had come to him as the direct result of conquest and the numerous forfeitures which had followed the allegiance of the Saxon noblemen to Harold and his cause, the infeudation of very much of the real property of the kingdom was complete.³ The occasion of this large handing over of their land to the Conqueror by the English landholders was the meeting of the king and his barons and great men at Sarum, in the year 1086, soon after a threatened invasion of the country by the Danes had called for extensive warlike preparations and shown the necessity of a compact military organization ready for quick and compulsory service. The invasion did not take place. But, after the danger which had been imminent was over, it afforded a powerful argument by which William induced the great Saxon proprietors to bring their lands, in form at least (for at first it was probably only meant by them to be a form), under feudal bondage and obligations.⁴ It was upon the heels of the compilation of the great survey of the

¹ See 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 79, 80, where the various elements which produced English feudalism are summarized.

² Digby, Hist. Law R. P. (5th ed.) pp. 37-43; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 62.

³ 2 Blackst. Com. pp. *49, *50. "The principal agents by which alodial owners of land were turned into feudal tenants were probably *conquest*, and *need of protection*. The lot of the conquered is always hard, and doubtless the alodial holder of land was glad to retain the enjoyment of a portion of his property on such terms as the conqueror chose to impose. The usual conditions were that the old free proprietor should be-

come the 'man' of the conqueror, and should be bound to military service. Moreover, in those troubled times it often became a necessity for the poor alodial holder to enter into the train of retainers of a powerful lord in order to obtain protection; hence the practice of 'commendation,' of becoming the man or vassal of the lord, receiving in return the protection without which the preservation of life and property was impossible. An element in this process was the surrendering of the alodial lands, to be received back under the condition of rendering military or other service." Digby, Hist. Law R. P. ch. i. § ii. (p. 32).

⁴ 2 Blackst. Com. p. *49.

realm, called Domesday Book, that this meeting at Sarum was convened. "This," says Blackstone, "may possibly have been the era of formally introducing the feudal tenures by law; and perhaps the very law thus made at the council of Sarum is that which is still extant, and couched in these remarkable words: '*Statuimus, ut omnes, liberi homines fœdere et sacramento affirmant quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omne fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere.*' The terms of this law (as Sir Martin Wright has observed) are plainly feudal: for, first, it requires the oath of fealty, which made, in the sense of the feudists, every man that took it a tenant or vassal; and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection, which exacts the performance of the military feudal services, as ordained by the general council. '*Omnes comites, et barones, et milites, et servientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et sint semper prompti et bene parati, ad servitium suum integrum vobis explendum et peragendum, cum opus fuerit: secundum quod nobis debent de fœdis et tenementis suis de jure facere, et sicut illis statuimus concilium totius regni nostri prædicti.*'"¹ Whether Blackstone be right or wrong in attaching so much importance to this meeting and the statutes which he quotes, it is certain that he was writing of a time when Norman customs and institutions were being pushed with vigor to the front, that England as a nation was then feudal, and that, at least within a very few years thereafter, tenure was a practically universal law of the land.

§ 250. **Nature of the Feudal System.**—The primary object of the feudal system, as it was elaborated in England, was to have all of the king's subjects who could carry arms bound by ties of the strongest self-interest to be ready, at a moment's notice, to form or provide an army for any and all sorts of military service. It did this by making the landowner's holding of his property dependent upon his obligation and readiness to render services to a superior lord. Its fundamental principle was that the king was the owner of all the lands within his

¹ 2 Blackst. Com. pp. *49, *50.

realm. He parcelled out large tracts of this property to individuals, or religious bodies, to hold as the vassals or tenants of the crown. These holders in their turn subparcelled, or *subinfeudated*, their respective portions to others below themselves, to hold as their vassals or tenants; and the latter, again, often brought in others as holders under themselves. And so the process of causing one man to be an owner in subordination to another, and the lower of these two to have a tenant under him, and so on down in a series, might be, and frequently was, carried on till between the king, who was the primary and only alodial owner of a tract of land, down to the person who actually held and cultivated or otherwise used it, there was a long chain of persons interested in it, each feudally bound by that interest to those above him and thus ultimately obligated to the crown. At the top of this series is the king, who is designated the *lord paramount*. Those who hold immediately of him, as his tenants, or vassals, are called tenants *in capite*, or in chief. Those at the bottom of the scale, who cultivate or otherwise make actual use of the land, hold *in demesne* as the tenants *paravail*,—the tenants who make the *avail* or profits out of the land itself. And those standing between these last and the king, or lord paramount, are the vassals of those above and the lords of those below themselves. Looked at in the latter light, they are *mesne* or intermediate lords. Thus, if A, the king, grant a piece of land to B, and B parcel out some of it to C who subinfeudates it to D, A is lord paramount; B is his tenant *in capite* and he is also a *mesne* lord, being the immediate lord of C, and C is tenant of B and *mesne* lord of D, who, being as we suppose the cultivator of the land, is the tenant *paravail*. Or, to take an actual case, during the reign of Edward I., Roger of St. German made the proceeds of land at Paxton in Huntingdonshire which he held of Robert of Bedford; the latter held it of Richard of Ilchester, who held of Alan of Chartres, who held of William Le Boteler, who held of Gilbert Neville, who held of Devorguil Balliol, who held of the king of Scotland, who held of the king of England. Roger of St. German, who held the land *in demesne* as tenant *paravail*, looked up to Robert of Bedford as the lord to whom he was immediately responsible, and through him and the other *mesne* lords to the king of England as lord paramount; while the king of Scotland, as tenant *in capite*, looked upward to the king of England, as his only lord,

and downward to Devorguil Balliol as his tenant or vassal.¹ Every such ladder of ownerships — and there was not an acre of land in the kingdom that did not have one of them, with at least two rungs, and often, as in the above illustration, with many more — had connected with it bonds of honor, self-interest, and even self-preservation, which bound the different parts almost indissolubly together.² For the vassal's retention of his land, and therefore in most cases the means of subsistence for himself and his family, depended on his loyalty to his lord and the faithful performance of the services incident to his tenure; while the lord was obligated, by the strongest ties of honor, self-respect, and feudal custom, carefully to look out for the welfare of his tenants. When, therefore, it was determined that the nation should go to war, the king called upon his tenants *in capite* to bring their forces to his service. They made the same demand upon their vassals; and the latter in turn did the same as to the immediate holders under themselves, until every knight and soldier had been reached by the call. Failure of a tenant to obey the summons meant consequent forfeiture of his land; but he knew that faithful performance of that which was properly demanded would result in the continuation of his holding and such protection for himself and his property as his lord could reasonably give. It is readily apparent how such a system, which was the plan of military organization throughout Christendom during five or six of the darkest centuries of the world's history, would provide just such a compact, quickly reached, and easily controlled body of warriors as was demanded in those troubled times for a nation's preservation and welfare.

§ 251. **Creation of Feudal Relationship — Terms used.** — The manner of conveying real property, to be thus held of a superior lord, was by words of pure donation, *dedi et concessi*; and these are still retained as operative words of conveyance in many forms of modern deeds.³ In its original use, before feudalism properly so called had developed, the gift was to be held at the will of the donor, and as found on the continent was called a *precarium*. In process of time, the grant came to be made for a certain and determined period, as for one or more years, and

¹ This illustration is given in 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 233, citing Rot. Hund. ii. 673. See also 2 Blackst. Com. pp. *59, *60; 1 Spence Eq. Jur. 135.

² 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 233.

³ Blackst. Com. p. *53.

later on for the life of the grantor or grantee. In these forms it was ordinarily styled a *beneficium*, or benefice. But, after passing through these transitional stages, and still another period in which it was the well-recognized custom for the land to be granted after the death of the vassal to his son or sons, these interests became inheritable and were so created and transferred that, when the first taker died his heir should have the property in his stead, and upon the death of such heir it should pass to his heir, and so on *ad infinitum*. It then, with this descendible characteristic, came to be denominated a *feud*, *feod*, *fief*, or *fee*.¹ It was through the weakness of Charlemagne's successors that the *beneficium*, which by his time had largely supplanted the *precarium* of the Romans, gradually transformed itself into the hereditary fief, or fee. The process was probably completed on the continent before the Normans invaded England.² But it is safe to say that, in view of this growth of ownership from *precarium* to fee, stress was always laid upon the inheritable quality of the fee or feud; and, therefore, in later centuries when the strength of feudalism was waning, the transition was natural to the meaning of the word fee which it still retains—an estate or interest which may descend from ancestor to heir. To own “in fee” is now to have real property in such manner that the law will cast the title upon the heir of the owner who dies intestate.

The process of bestowing a feud or fee upon a vassal was called a feoffment. The physical act of putting him into possession and enjoyment of the property was frequently spoken of as an *investiture*, which was an open and notorious ceremony in the presence of the other vassals of the same lord as witnesses, consisting often of the lord's taking off his coat and putting it upon the incoming tenant as a symbol of placing on him the ownership of the land. The lord also, in this ceremony, made livery of seisin to the feudatory, which was the act of handing him something connected with the land, such as a stone, or twig, or clod of earth, and stating that he gave it to him in the name of seisin. The other vassals were called upon to observe and take mental note of these performances: and thus “the evidence of property was reposed in the memory

¹ *Termes de la Ley*, “Feud;” Wright, Ten. 19, 4; Dalrymp. Feud, 199; 1 Spence, Eq. Jur. 34; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 67.

² It seems that, about the year

A. D. 1000, they began to be granted in perpetuity, and then took the name of “fueds” or “fees.” Irving, Civ. Law, 200; note to 1 Wash. R. P. (5th ed.) pp. 45, *19.

of the neighborhood; who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs adduced by the parties litigant, but also by the internal testimony of their own private knowledge.”¹

§ 252. **Fealty — Homage — Warranty.** — The feudal bond always carried with it the duty of the vassal to take and live up to the oath of *fealty* (or fidelity, *fidelitas*) to his lord. This oath might be taken, in any ordinary form of solemn swearing, either before the lord in person or before his agent or bailiff.² The tenant stood, with his hands on the Gospels, and said: “Hear this, my lord: I will bear faith to you of life and member, goods, chattels, and earthly worship, so help me God and these holy gospels of God.”³ The spirit of this oath pervaded all the relations of lord and vassal, and exerted a powerful influence in the legal determination of their reciprocal rights and duties. A similar modern principle, though not a formal asseveration and perhaps not a direct outgrowth of the ancient obligation, is the stringent doctrine, in the law of landlord and tenant, that the tenant is estopped to deny his landlord’s title to the demised property.⁴ Although the ancient writers do not so state, there was doubtless added to the form of oath above quoted a saving of the tenant’s duty to the king. And certain it is that we find a growing and finally dominant requirement that the king is to be treated as the only *liege* or primary lord, and the ultimate necessity that every male of the age of twelve years and upwards shall swear to him and his heirs, “to bear faith and loyalty of life and limb, of body and chattels and of earthly honor.”⁵ Thus arose the oath of *ligeance* or allegiance, which still may be required by the sovereign of every citizen and in theory is taken by all, and which, when thus finally evolved, differs from its progenitor, the oath of fealty, chiefly in the fact that the latter was only required to be taken by a tenant to his immediate lord.⁶

When the property granted to the vassal was a fee or feud

¹ 2 Blackst. Com. p. *53. See 2 Poll. & Mait. Hist. Eng. Law, bk. ii. ch. iv. § 2.

² Wright, Ten. 35. Stubbs, Const. Hist. § 462 n.

³ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 298, quoting Bracton, f. 80; Termes de la Ley, “Fealty.”

⁴ Blight v. Rochester, 7 Wheat.

(U. S.) 535, 548; Tilton v. Reynolds, 108 N. Y. 558; Bigelow, Estoppel (5th ed.), 506, 510; Smith, Landl. & Ten. 234 note a; 6 Amer. L. Rev. 1, *et seq.*

⁵ Britton, i. 185; Hale, P. C. i. 62-76; Co. Lit. 65 a.

⁶ 1 Blackst. Com. pp. *366-*368; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 298-300.

of inheritance, the more stringent oath of homage was also usually required. The vassal, kneeling on both knees, ungirt and with his head uncovered, placed his hands between those of the lord, who sat before him, and said: "I become your man" (*devenio vester homo*) "of the tenement that I hold of you, and faith to you will bear of life and member and earthly worship, and faith to you shall bear against all folk who can live and die, saving the faith that I owe to our lord the king." He then received a kiss from the lord.¹ This solemn ceremony, called *homagium*, or manhood, as the oath states, made the vassal the "man" of his lord. It seems to have carried with it more of religious sanctity than did the oath of fealty. Homage was never taken, or "*done*," by any but free men; for the doing of it by a villein or unfree tenant might imply his enfranchisement.² Homage was purely a feudal matter, which has no representative in American law.

One of the most important duties, which the lord, from his position as such even without any formal declaration, owed to his vassal, was that of defending him in possession of the land "against all men who can live and die."³ This protection was what, from the standpoint of the vassal, gave incentive and efficacy to the feudal relationship. It was the *quid pro quo*, which, in "commending" himself to a powerful earl or abbot, he received in exchange for his submission, fealty, homage, and services.⁴ It carried with it the obligation of his superior to give him another tenement of equal value, if he were evicted from the property assigned to him. If a suit affecting the title to the land were brought against the vassal, he *vouched in*, or called in, his lord to defend; the latter, if he did his duty, defended the action; and, if he failed to do so or his efforts in the matter were unavailing, he must compensate the tenant by giving him other real property of equal value. Thus the

¹ 2 Blackst. Com. pp. *53, *54; Britton, ii. 37; Littleton, § 85.

² 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 296, 297, 305.

³ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 306; 2 Blackst. Com. p. *57; Wright, Ten. 38.

⁴ "Bracton defines homage thus: Homage is a bond of law (*vinculum juris*) by which one is holden and bound to warrant, defend, and acquit the tenant in his seisin against all men, in return

for a certain service (*per certum servitium*), named and expressed in the gift and *vice versa* whereby the tenant is 'really' bound (*re obligatur*) to keep faith to his lord and do the due service; and such is the connection by homage between lord and tenant that the lord owes as much to the tenant as the tenant to the lord, save only reverence." 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 301.

lord *warranted* his vassals' title.¹ The covenants express or implied, which bear the same name in our modern deeds of conveyance, are the representatives of the ancient warranty. It originated as an incident of feudalism and developed into a contractual obligation of a vendor to his purchaser.²

The other rights, obligations, and burdens, which attended the relationship of lord and vassal, are best understood in connection with the different forms of tenure discussed in the following pages.

Tenure.

§ 253. **Definition of Tenure — Classification.**— It has already been shown that, between the lord and his vassal, the feudal constitution prescribed a *tenure* of some kind for every acre of land in England. In its general sense, tenure may be defined as the holding and manner of holding of lands, tenements, or hereditaments by one person of another.³ It would be idle to attempt to describe all the minor forms of such holdings, which are mentioned by the different authorities, ancient and modern, and to endeavor to harmonize their statements as to the characteristics of the various species of tenure. The truth seems to be that the rights, privileges, duties, and burdens incident to feudalism changed so materially, from century to century and even from generation to generation, that a designated form of tenure often had essentially different characteristics in one age from those which it possessed in another; and the natural tendency of writers to generalize and systematize has often stood in the way of careful observance of these mutations. For examples, knight-service in the reign of Henry II. was materially different from knight-service in the time of Edward I.; and the word socage, about the derivation of which there has been so much heated controversy, was employed during the dark ages to describe many and largely divergent forms of feudal tenure. It is, therefore, sufficient here to explain the fundamental characteristics of the chief classes of tenure of real property that have existed in England. A primary division to be made for this purpose is into *free tenures* and those that were *not free*. The former were such as demanded no services

¹ Wright, Ten. 38; 2 Blackst. Com. p. * 57.

² Wright, Ten. 38; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 306.

³ Wright, Ten. 19-21; 2 Blackst. Com. p. * 59.

from the vassal except those which were honorable or worthy of a free man, as the obligation to serve the lord in war, or to pay him money or other things of value; while the latter required menial labor, such as would be performed only by persons of servile rank, as to plough the lord's field, or to take care of his cattle. Another natural division had regard to the amount and character of the services demanded — whether they were *certain* or *uncertain*. Thus, in each kind of tenure, its incident services were either *free* or *base* and also either *certain* or *uncertain*. In the following discussion, it will more fully appear that these are the true bases of differentiation. Taking them as such, the five chief forms of tenure — chief in the order of their historic and economic importance — are: 1. Knight-service, in which the services were originally free and uncertain; 2. Free and common socage, in which they are free and certain; 3. Villein socage, in which they are base and certain; 4. Pure villeinage, in which they are base and uncertain; and 5. Copyhold, the outgrowth and modern successor of pure villeinage. The historical importance of some of the inferior or subsidiary forms of tenure and their similarity to or outgrowth from the others require them to be discussed in connection with the more important kinds to which they are most nearly related. Therefore, in this chapter, grand serjeanty, frankalmoin, and divine service tenure will be explained immediately after knight-service; and petty serjeanty, burgage, and gavelkind will be discussed in connection with free and common socage.

§ 254. 1. **Tenure by Knight-service.** — Tenure in chivalry, or by knight-service — military tenure (*per servitium militare*) — was the oldest, noblest, most universal and most highly esteemed of all the free lay tenures. The services incident to it were military in character (and, therefore, in those times the most honorable of all forms of secular labor); and, while the number of days per year during which the tenant could be required to perform the warlike duties for his lord soon became limited, the original and fundamental conception of such a holding was that the services were not only *free* in nature but also *uncertain* as to their extent.¹ He who had property under this form of tenure, his holding being as it was entirely military and the general outcome of the feudal establishment in England, was said to have a *proper* feud (*feoda propria*). His in-

¹ 2 Blackst. Com. pp. * 61, * 62; 1 Poll. Mait. Hist. Eng. Law (2d ed.), pp. 252, 253.

terest was thus distinguished from the kinds of *improper* feuds (*feodæ improprie*), in which the services were of a peaceful character, such as cultivating the lord's private lands, rendering to him an annual payment in money or in agricultural products, and the like.¹

During the different eras of feudal supremacy, the extent of the required attendance by the vassal upon his lord in the wars varied considerably. Within a century after the conquest, moreover, the system of paying *scutage* to the lord, which was a pecuniary return made by the tenants to enable the lords to hire soldiers in the place of the tenants, became quite prevalent, especially in favor of the king as lord paramount.² But, in its most settled and stable form, tenure by military service called for a knight's fee, or twelve ploughlands,³ for each vassal's use, from the lord; and, in return for the same the vassal's *personal* service upon the lord in military operations for not more than forty days in each year. The value of the land, which should constitute a knight's fee, and probably its territorial extent also, varied greatly from time to time. If any one tenant held more or less than the quantity, which was required at the time to make such a fee, the number of days during which he could be called upon to render military services for his lord was greater or less in proportion.⁴

It was in the working out of the theory of tenure by knight-service in practical military operations, and in supplying the demand of the superiors for complete support and maintenance by their inferiors and dependants, that its inherent weakness and inadequacy, as it was viewed from the lord's standpoint, became apparent, and that stringent measures for the remedy-

¹ Wright, Ten. 32, 33; 2 Blackst. Com. p. *58.

² "Speaking roughly, we may say that there is one century (1066-1166) in which the military tenures are really military, though as yet there is little law about them; that there is another century (1166-1266) during which these tenures will supply an army, though chiefly by supplying its pay; and that when Edward I is on the throne, the military organization which we call feudal has already broken down and will no longer provide either soldiers or money, save in very inadequate

amounts." 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 252.

³ A ploughland was probably uncertain in extent, being measured rather by value than by quantity of territory. Some, however, have contended that it was a fixed number of acres, the amount being placed by some as low as twenty acres, and by others as high as one hundred and twenty acres. Co. Lit. 69 a. Blackstone tells us that in the reigns of Edward I. and Edward II., the value of a knight's fee was placed at £20 *per annum*. 2 Blackst. Com. p. *62.

⁴ Lit. § 95; 2 Blackst. Com. pp. *62, *63.

ing of its defects appeared in the form of numerous exactions of pecuniary returns and services.¹ Few wars could be carried to successful issues with soldiers who would not fight more than forty days in a year. Hence the system of demanding scutage, and its gradual increase to the exclusion of the original plan of the vassal's personal military attendance. No superior lord, who was conversant only with warlike affairs and whose time was wholly spent in matters of arms and chivalry, could in this way provide the necessaries and luxuries demanded by himself and his family. Hence the harsh and intricate laws, which imposed other pecuniary burdens upon the vassals, as incidental appendages and consequences of their holdings, gradually taking definite form and finally becoming inseparably connected with military tenure. These onerous fruits or incidents of knight-service were aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat. A few words are needed as to each of them.

§ 255. *Aids*. — The fealty and other feudal obligations always due from the vassal would require his purse, as well as his person, to be at the lord's service whenever necessary for the latter's safety or prosperity; and the original conception of aids was simply that this duty of the inferior to the superior should be faithfully and conscientiously performed.² But the unjust exactions, which the lords sought to make, upon the basis of this loose and vague principle, caused the number and forms of these pecuniary returns to be settled by numerous contests and finally to be definitely fixed by statutes. The aids thus determined were money contributions by the tenants for three purposes: (a) to ransom the lord's body if he were taken prisoner; (b) to defray the expenses of conferring the order of knighthood upon his oldest son, and (c) to supply a suitable marriage portion or *dowry* for his oldest daughter. It was declared by *Magna Charta* that none but these three aids should be taken by any inferior lord, and that the king would demand no aids without the consent of parliament.³ But in the subsequent charters this provision was omitted. Aids for various other purposes were then exacted, such as to pay the lord's debts, to stock his farm, to enable him to pay a fine to the king,⁴ etc. But the statute entitled *Confirmatio Chartarum*

¹ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 252–255.

² Glauv. ix. 8.

³ *Magna Charta* (1215), ch. 12.

⁴ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 350.

(1297) again restricted them to the ancient three, and again required that the amount in each case should be reasonable.¹ The statute 1 Westminster (1275)² had already restricted the amount which each tenant should pay to any *mesne* lord, as a marriage portion for his oldest daughter or for the knighting of his oldest son, at twenty shillings; and in 1342 the tenants *in capite* obtained the same statutory restriction against the king.³ The amount of the third ordinary aid, that for the ransoming of the lord from captivity, was left of necessity to be determined from the circumstances of each case.

§ 256. **Relief.** — The original conception of feudal relationship was that its continuance depended on the volition of both parties to the compact and that, therefore, it would terminate upon the death of either of them.⁴ If the heir of the decedent desired it to be restored, the other party could dictate the terms upon which this might be done. It was also a well-settled custom, while fiefs or feuds were usually voluntary gifts, for the vassal, upon entering into possession of the land, to make a donation of some kind to his lord.⁵ From these sources sprang the relief, or return in money or products of the land, when the tenant of an inheritable fief died, and his heir succeeded as vassal to the position of his ancestor. Because of his death, the property was regarded as falling away from the family of the tenant, and this payment was demanded in order to raise it up again (*relevare* — relief) to the possession and enjoyment of the heir. It was always justly regarded by English tenants as one of the most onerous and oppressive of feudal burdens.⁶ Numerous statutes were enacted to restrict the lords from demanding as a right too much of that which the vassals properly thought should be only a matter of bounty or gracious gift.⁷ And the amount of relief thus at length fixed upon, and generally although not always adhered to, was one hundred shillings for every knight's fee.⁸ This was re-

¹ 25 Edw. I.; 2 Blackst. Com. p. *64.

² 3 Edw. I. ch. 36.

³ 25 Edw. III. stat. 5, ch. 11; 2 Stubbs, Const. Hist. 521.

⁴ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), 317.

⁵ 2 Sulliv. Lect. 124; 2 Blackst. Com. p. *56; Wright, Ten. 15.

⁶ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), 308; 2 Blackst. Com. p. *65.

⁷ From the time of the Conqueror

to that of Henry II., such acts were repeatedly passed and subsequently disregarded by the more powerful lords. William Rufus refused to be bound by such a statute of his father, and it was not until 27 Hen. II. that relief became definitely fixed and acquiesced in by the tenants. 2 Blackst. Com. pp. *65, *66.

⁸ 2 Blackst. Com. p. *66.

garded as equivalent to the first year's income, and was payable within that year, if, at the time of the death of the vassal, his heir were twenty-one years of age.

§ 257. **Primer Seisin.**—This was, in substance, an additional relief which early in English feudal law became restricted to the tenants *in capite*. When such a tenant died leaving an heir who was then of age, the latter must pay to the lord paramount, for the privilege of taking up the inheritance, one year's income of the land, in addition to the ordinary relief, if the land were in possession of the heir, and if it were not, but the heir must wait for possession until the expiration of a preceding life-estate, then one-half a year's income in addition to relief.¹ The history of the development of relief shows that theoretically the intermediate lords had as much *right* to primer seisin as had the king. It was all a matter of gradual adjustment, in the process of which the lord paramount succeeded in acquiring a source of income which the *mesne* lords were obliged to forego.²

§ 258. **Wardship.**—If the feud descended, upon the death of the vassal, to an heir who was under twenty-one years of age if a male, or under fourteen years of age if a female, the lord had the custody of the person of such heir during his or her minority, and the control of and income from the land, without any duty to account for the income to any one.³ He must use the property reasonably, however, and not commit waste upon it; and out of the proceeds thereof he must support and educate the heir, his ward, in accordance with his or her station in life.⁴ The male heir became of age, and the wardship ceased, when he became twenty-one; and he could then recover his land by paying one-half a year's income thereof to the lord. The female heir became of age, and had the same right to recover her land, when she was sixteen. No wardship of a female heir occurred, if she were fourteen or over when her ancestor died. But, if she were under that age at the time of her ancestor's death, the wardship then commenced, and continued until she was sixteen.⁵ The principle on which this right of wardship reposed was that, during the time when the vassal could not in person render military services for the lord, the latter was

¹ Last preceding note.

² 1 Poll. & Mait. Hist. Eng. Law (2d ed.), 307-318; 2 Blackst. Com. pp. *66, *67.

³ 2 Dalrymp. Feud, 44, 45; 2 Blackst. Com. p. *67.

⁴ 2 Blackst. Com. pp. *68, *69.

⁵ 2 Blackst. Com. p. *67; Wright, Ten. 90-92.

entitled to the proceeds of the land with which to supply a substitute. The male tenant became fully capable of rendering those services at the age of twenty-one. The female tenant was capable of marrying at fourteen, and her husband could then perform the services due to the lord.¹

§ 259. **Marriage.** — Growing out of wardship and incident to it was the lord's right to select a proper spouse for his ward, whether male or female. This was designated the right of marriage (*maritagium*, as distinguished from *matrimony*). It continued as long as the wardship, and practically authorized the lord to *sell* his infant vassal in marriage, with the single condition that there should be no disparagement in the match.² If the ward refused to marry the person thus selected, he or she forfeited to the lord the value of the marriage, or what such selected person was willing to pay; and, if the ward married without or against the lord's consent, the forfeiture was double such value.³ This incident of tenure was often a very fruitful source of income to the lords. It and the wardship to which it was incident were regarded by the English tenants as the most unjust and grievous of all the burdens of feudalism.⁴

§ 260. **Fines for Alienation.** — The primal theory of the feudal connection being that of personal obligation, it followed as a logical consequence that neither the lord nor the vassal, without the consent of the other, could alienate his interest and thus bring in a new party to the relation. In order to transfer his rights and duties to another, the lord must have the acquiescence, or *attornment*, of his tenant; and the vassal should not substitute another in his place without the consent of the lord. Whether this theoretical view of the situation

¹ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), 318–329; Wright, Ten. 90–92; 2 Blackst. Com. pp. *67–*70. Wardship was regarded by the feudal tenants as one of the greatest hardships which they were obliged to endure. It was an interest for the benefit of the guardian, rather than a trust for the protection and benefit of the ward. It was, therefore, assignable by the lord, and on his death it might be transferred to his personal representatives. (Co. Lit. 86, n. 11.) It remained, as an incident of tenure, until abolished by the statute 12 Car. II. ch. 24.

² 2 Blackst. Com. p. *70; Wright, Ten. 97; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), 318.

³ 2 Blackst. Com. p. *70; Wright, Ten. 97.

⁴ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), 318–328. In one case the Earl of Warwick obtained £10,000 for his consent to the marriage of his female ward; and for the custody of the lands and person of the heir of Gilbert de Unfranville and his marriage, Simon de Montford gave the king 10,000 marks. Sulliv. Lect. 248; Lord Littleton's Hist. Hen. II. 2 vol. 296.

produced the results which finally emerged, as is thought by some, or whether feuds originally alienable gradually came to be clogged with restrictions in this respect growing out of the power and greed of the lords, as is thought by others, it is certain that the lord was rarely if ever called upon to pay his vassals for an attornment, and that, by the time of the reign of King John, the tenants were ordinarily required to make payments, called *fin*es, to their lords for the privilege of alienating their feuds. By one of the provisions of *Magna Charta* and by the important statute of *Quia Emptores*¹ (18 Edw. I.), all tenants except those *in capite* were relieved of this burden; but since neither of those enactments applied to the vassals who held immediately of the king, fines for the privilege of disposing of their lands were still enforced against them. While, therefore, the lower tenants were thus permitted to alien the whole of their estates, to be held of the same lord of whom they themselves had held, the king's tenants *in capite* must continue to pay fines for this privilege, or take the risk of an absolute forfeiture of their lands. The subsequent statute of 1 Edw. III. ch. 12, forbade forfeiture, even in such instances, and provided that, in case of his tenant's alienation of his feud, the king should only be entitled to a reasonable fine. The construction of this last statute settled it that, for a license to alien, the tenants *in capite* should pay one-third of the yearly value of the land; and, if they presumed to alien without first procuring the king's license, the fine should be a full year's value. While fines, as such, remained as feudal burdens, these continued to be the rules by which they were assessed upon the king's tenant's, while the inferior vassals were permitted after 18 Edward I. to dispose of all their interests without making any such payments. The effects of fines in the gradual development of the right to freely dispose of real property will be noticed hereafter in the discussion of that general topic.²

§ 261. **Escheat.** — Back of the ownership of the vassal was always that of his lord. If the former violated his obligation to the latter, the goods and chattels on his land might be distrained and held by the lord as a pledge for the proper rendering of services by the tenant, and the due performance of his feudal duties. By statutes in the first year of Edward I., the lord was also entitled to seize and hold the land until the

¹ 18 Edw. I. ch. i.

² § 282, *infra*.

tenant's breach of the feudal bond was repaired.¹ And this superiority, which the lord always had over the land, might become a full and complete ownership at any time, if the tenant died without heirs, or if his blood were corrupted by outlawry or felony, so that no one could inherit from him. The land was then said to *escheat* (*excadere*), or fall back to the lord. If the crime by which the inheritable quality of his blood was extinguished were treason, the property was *forfeited* to the king; but, when the tenant was only outlawed or convicted of felony, the king had the ancient right of wasting his lands for a year and a day, and, subject to this right, they escheated to the immediate lord of the felon or outlaw.²

Escheat is the feudal incident of real-property ownership which is most nearly reproduced in American law. Each of the United States retains the original and ultimate property of all lands within its jurisdiction, and takes back to itself all lands the title to which fails because of defect of heirs. While, however, such a passing of title back to the state is here called *escheat*, it is not a surviving element of an otherwise obsolete system; but it is a principle inherent in the state's right of sovereignty, which is similar to the feudal doctrine of the same name, and which has been established as a positive and practically necessary part of modern jurisprudence.³

§ 262. **Decline and Destruction of Tenure by Knight-service.**—As already explained, the theory upon which this ancient and honorable form of tenure was based was that each holder of land should personally attend and serve his lord in the wars, and be ready, at a moment's notice, to fight, and to continue fighting for at least forty days in each year for every knight's fee, and also to pay, when occasion properly required, the above described pecuniary returns which were incident to his tenure. There was thus to be formed "a national militia composed of barons, knights, and gentlemen, bound by their interest, their honor, and their oaths, to defend their king and country," and for this purpose to rally at the trumpet-call around their respective immediate lords.⁴ But the practice rapidly diverged from the theory. There soon came to be many smaller tenants by knight-service, who did not each own a knight's fee, and

¹ Statute of Gloucester, 6 Edw. I. ch. 4; Statute of Westm. II. ch. 21.

² 2 Blackst. Com. p. *72; Glanv. vii. 17; Bract. f. 297, b.

³ See § 290, *infra*, and notes.

⁴ 2 Blackst Com. p. *75.

who were required to contribute ratably to a sum of money sufficient to hire a soldier or knight to represent in the army the entire knight's fee. There were other tenants who could not personally bear arms, such as females and aged or disabled males; and the line between those who *could not* fight and those who *would not* do so was often very hard to draw. The vassal who held an entire knight's fee, readily concluded that, if his neighbor who owned only one-fortieth of a fee went quit of personal service in the field by the payment of one shilling, he himself should avoid actual warfare by the payment of forty shillings; and the able-bodied tenant, who could fight if he would, naturally considered that he had done his whole duty to his lord if he paid to him as much money as was paid by another holder of an amount of land equal to his own, who was aged or infirm.¹ At first these payments, which were called *scutage*, or *escuage*, in the Norman French, (Latin, *scutagium*), were fixed at such amounts as would actually supply a soldier for each knight's fee, the principle being that, instead of personally supplying one to serve for him as he had formerly sometimes done, the vassal enabled the lord himself to fill his place in the ranks. From this, the step was natural and easy to the mere levying of scutage, at a uniform rate for each levy, upon the vassals, and the taking of the product by the lord for the raising, equipping, and maintaining of such an army as he could therewith procure. The vassal was then often said to hold *by scutage*, to distinguish his tenure from the original form of knight-service; but the only difference between him and the warrior-vassal consisted in their different methods of filling the ranks of the army of their lord.² It is doubtful if scutage could ever be legally levied by any but the king, or (if for a *mesne* lord), by aid of the king's writ; and, after much friction and numerous pledges by the sovereign, and violations of the same, it was settled by statute 25 Edw. I. ch. 5, 6, as indeed it had also been provided by *Magna Charta* with but short-lived

¹ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 272.

² This is the meaning of Littleton's statement, to the effect that tenures by homage, fealty, and escuage were tenures by knight-service. Lit. §§ 95-97. "It would seem that the tenants as a body got the better in the struggle, and established the rule that if they did not choose to serve, no worse could

happen to them, than to be compelled to pay a scutage at the rate fixed by royal decree, a sum much less than they would have spent had they hired substitutes to fill their places. In short, 'tenure by knights' service of a mesne lord, became first in fact, and then in law, tenure by escuage." 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 272.

benefit, that the king should take no such payments without the consent of parliament. The scutage, or escuage, thus levied or permitted by the king, with the consent of parliament, was the ground-work of all succeeding subsidies, and of the land tax of later ages. But it differed from a mere pecuniary rent, in that it never was a settled, invariable sum, but depended for its amount and the occasions of its assessment on the exigencies of the times and the special consent of parliament to each levy. As soon as a vassal came to have his land by paying a determined yearly rent, he no longer held by knight-service, but became a socage tenant of some kind.

The consequences of the gradual change of the original form of knight-service, with its close personal bond between lord and vassal, into the hard, unsocial holding by scutage with the other numerous pecuniary burdens, which tended always to increase rather than to diminish, proved to be far more detrimental to the tenant than to his lord. The onerous incidents of his holding were all preserved and often augmented against the vassal, while all the benefits of knightly standing and prestige were swept away. The result was continued and persistent clamor for abolishment or diminution of the burdens under which the landholders were made to groan. And, finally, after numerous palliatives and ineffectual measures, tenure by knight-service, with all its objectional incidents, was entirely abolished by the statute 12 Car. II. ch. 24. During the Commonwealth, all military tenures had been discontinued; and, immediately after the Restoration, this enactment, which Blackstone declares was a greater acquisition to the civil property of the kingdom than even *Magna Charta* itself, turned all tenures into free and common socage, "save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty." It also did away entirely with scutage, aids, primer seisin, tenancy *in capite*, forfeitures and payments for marriage, and fines for alienation, and retained only those forms of wardship and relief which, as modified and ameliorated, were applicable, as hereafter explained, to tenure by free and common socage. The net result, then, of this sweeping destruction of tenures and their appendages was the preservation of tenures by free and common socage, frankalmoin, copyhold, and grand serjeanty, with escheat and improved and beneficial forms of relief and wardship as their only feudal incidents.

§ 263. **Grand Serjeanty.** — As history advanced, the *servientes* of Domesday Book — those who were connected with the land as *personal* servants of its owner — became the tenants by *serjeanty* in the completed feudal system. The services, which such vassals rendered to their lords, had their foundation in the idea of “servantship” to an immediate master.¹ And, as the grades of the personal attendance came to diverge, some becoming occasional performance of high and honorable offices about the person of the king, and others degenerating into fixed and more humble duties to him personally, or to the person of a *mesne* lord, serjeanties were divided into *grand serjeanty* (*magnum servitium*) and *petit serjeanty* (*parvum servitium*).² Since the services of the latter class were fixed and certain, it was in substance a species of socage tenure, and will be more fully noticed hereafter.³

Tenure by grand serjeanty was the holding of land of the king (or possibly sometimes of a powerful intermediate lord), with the duty to render to him in person, whenever occasion might require, some special honorary service, as to carry his sword or banner in battle, to act as his special chamberlain, forester, or messenger, or to be the king’s butler or champion at his coronation.⁴ Such holdings were very similar to those by knight-service; but, being of a closer personal nature, no scutage ever took the place of the actual services, the tenant could not alien, nor even subinfeudate his land without the lord’s consent, and the pecuniary returns became fixed and determinate much less slowly and definitely than in the case of knight-service.⁵ One of the special forms of grand serjeanty, which is mentioned by Blackstone, was to warn the king’s subjects, by winding a horn, when the Scots or other enemies entered the land. As shown above, the honorary services of grand serjeanty were retained by the statute 12 Car. II. ch. 24.

§ 264. **Frankalmoin.** — Frankalmoin, as a species of free tenure, was one of the most ancient and long-lived of all of these methods of holding property.⁶ It was often spoken of as tenure

¹ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 288–290.

² 2 Blackst. Com. pp. *73, *81; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 290.

³ § 268, *infra*.

⁴ 2 Blackst. Com. p. *73; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 287.

⁵ Bract. f. 84 b, f. 395; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 290.

⁶ “It was an old Saxon tenure, and continued under the Norman revolution, through the great respect that was shown to religion and religious men in ancient times.” 2 Blackst. Com. p. *102. And, in the third report of

in free alms (*libera eleemosyna*), and was the holding from and of a donor by an abbot, prior, church, or other religious corporations, aggregate or sole, and their successors forever, under the obligation of making orisons, prayers, masses, and the like, for the soul of the donor and for the souls of his heirs, dead or alive.¹ These religious ceremonies were indefinite in extent, and in no way enforceable except as the rules or discipline of the church might require their observance. They were of the most honorable and holy nature, and superseded and precluded all requirements for fealty or homage. Gifts in frankalmoin were regarded as made to God. They were, therefore, largely outside of the sphere of merely human justice.² The tenants were bound by the *trinoda necessitas* of repelling invasions and repairing bridges and castles;³ but, if they failed to perform the religious services for the donor or his heirs, there was no remedy except a complaint to the ordinary, or to the visitor of the corporation, for the correction of the wrong. Hence the feature of this sort of honorable tenure, which most attracted the notice of lawyers, was its negative characteristic,—the absence of all services that could be enforced by the secular courts.⁴

§ 265. **Divine Service.**—Frankalmoin tenure, then, may be summarized by saying that the services which it implied were (a) spiritual and (b) indefinite; and therefore they were unenforceable except by the tribunals of the church. When, as in some instances it occurred, the religious personage or institution as tenant was obligated to do some *special* and *certain* service of a spiritual nature, as to sing a specified number of masses, or to distribute in alms a designated sum of money, it was called a tenure by *divine service*. This was still a free holding, but less honorable and dignified than frankalmoin. The lord might distrain, without any complaint to the visitor, if the tenant in divine service failed to duly perform the stipulated services.⁵

From the beginning of the feudal period to the time of Henry VIII. large quantities of the land of England were held

the English Real Property Commissioners (1833), it and tenure by *divine service* were said to be then still in existence. Real Prop. Comm'rs, 3d Rep. 7.

¹ Bract. 207; Lit. §§ 133–135; 2 Blackst. Com. p. *101.

² Bract. f. 12; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 243, 244.

³ 2 Blackst. Com. p. *102.

⁴ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 240–244.

⁵ 2 Blackst. Com. p. *102; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 240. Some instances of tenure by divine service are mentioned in Domesday Book, e. g. ii. 133, 133 b; and it was said to be a still subsisting form of tenure in 1833. Real Prop. Comm'rs, 3d Rep. 7.

by these religious tenures, and especially by the more dignified one of frankalmoin.

§ 266. 2. **Socage**—**Free and Common Socage**.—The sokemen (*sokemann*) were a class of landholders who are mentioned in Domesday Book as rendering definite agricultural services (services of the plough) for the use of their lands. Their condition was probably described, in a general way, by the word socage. After the conquest, these holders, probably at first in large part because of their insignificance, were the most successful in retaining alodial incidents to their tenures, and preserving them most nearly exempt from feudal burdens. The negative characteristics of their tenures, the features which embodied this comparative freedom from feudal bondage, thus came gradually to give the meaning to the word socage. And hence that word was used to include all holdings, for fixed and certain returns, which were “not spiritual, not military, not serviential.”¹ As a class, with these chiefly negative characteristics, they were the successors of the alodial proprietorships of Anglo-Saxon times. The fixedness of services, making the return to the lord in effect *rent*, and thus distinguishing it from the irregular exactions of scutage and the indefinite duties associated with spiritual holdings, constituted the most prominent feature of all these socage tenures.² When this rent, or render, was of an honorable character, such as the paying of a fixed sum of money every year, or the annual giving of a determined quantity of the fruits and produce of the land, the tenure was by *free and common socage*; when the return to the lord was of a baser nature, as the ploughing of so much land each year, or the personal doing of some other prescribed servile labor, the holding was by *villein socage*, which was one of the unfree tenures.³

§ 267. **Incidents of Tenure by Free and Common Socage**.—Free and common socage, or *free socage* merely, as it is often called, with its services to the lord fixed in amount and free and honorable in character, and on its prominent negative side excluding most of the oppressive and objectionable incidents of feuds, grew in favor and extent and, gradually at first, but quickly after the enactment of the statute 12 Car. II. ch. 24, absorbed or superseded almost every other species of

¹ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 291-295.

² 2 Blackst. Com. pp. *75, *78, *79; Digby, Hist. Law R. P. (5th ed.) p. 45.

³ 2 Blackst. Com. pp. *79, *98.

tenure. Relieved of practically all the burdens of medieval feudalism, it exists to-day as the almost universal method of holding land in England. Before the statute 12 Car. II. ch. 24, it was subject to aids, primer seisin, and relief; but was free from the oppressive incidents of feudal wardship and marriage, and probably from that of fines, except in cases of tenure *in capite*.¹ The guardian in socage was the oldest male relative, who could not inherit the ward's land; and he was accountable for its profits at the termination of the wardship.² The oath of fealty was always attached to this species of tenure, and sometimes constituted the only service due (for the returns to the lord ranged from such as were merely nominal to such as constituted practically rack-rent), but the oath of homage could not always be required by the lord.³ The effects of the statute 12 Car. II. ch. 24, on this kind of holding were the leaving of the oath of fealty demandable at any time, preserving the fixed rents, escheat, and guardianship in socage as they had formerly existed, and sweeping away all other feudal incidents.⁴ And such is substantially the form in which tenure by free and common socage exists in England at the present time.

§ 268. **Petit Serjeanty — Burgage — Gavelkind.** — Within the sphere of free-socage tenure were included all methods of holding land by honorable and certain rents and duties; among which *petit serjeanty*, *burgage*, and *gavelkind* tenures are to be specially noted. The first of these resembled grand serjeanty, in assuming a close personal relationship to exist between lord and vassal, and making its return or renders to be done for the lord's use about his person; but it became a form of free socage because these returns were a fixed rent, such as the periodical giving to the lord of a sword, a lance, an arrow, or some other implement of war. Such holdings were, as a rule, directly of the king, and were styled *parvum servitium regis*.⁵

Tenure in *burgage* exists where the lands of an ancient borough are held by an established rent payable to the lord. Through all the mutations of feudalism, such holdings of borough houses and lands, being usually small and compar-

¹ 2 Blackst. Com. pp. *86-*89; Digby, Hist. Law R. P. (5th ed.) p. 47.

² Ibid. And such is the nature of guardianship in socage, at the present time.

³ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 291.

⁴ 2 Blackst. Com. pp. *86-*89.

⁵ 2 Blackst. Com. pp. *81, *82.

atively insignificant, continued to exist; and they are still a feature of English tenure. Besides having the ordinary characteristics of socage holding, they were distinctly marked by their subjection to local customs, especially as to dower, the descent of lands, and the disposing of them by will. In some of the boroughs, for example, a widow was dowable of *all* her husband's tenements, and not merely of one-third of them; and the legal title to most of these borough holdings could be devised by will, even before the Statute of Wills, in the 32d year of Henry VIII. made it possible for nearly all real property to be willed away.¹ One of the most remarkable of these local customs was the inheritance of a father's land by his *youngest* son, rather than by his oldest.²

Gavelkind tenure, as a species of free socage, was a conspicuous remnant of Anglo-Saxon liberty, enjoyed chiefly in the country of Kent. The boast, that every child born in Kent was born free, was probably made possible by the persistent early struggles for liberty on the part of its inhabitants, and by its subsequent unrivalled prosperity as a gateway of commerce, which naturally favored the owners and tillers of its soil. And the results of these struggles and influences were that the gavelkind holdings in Kent came the nearest of all tenures to alodial ownership.³ The name of this holding came from its Anglo-Saxon form, in which the payment of *gafol*, or rent, distinguished it from the military tenures. The special customs which belonged to it were that the lands, (a) descended equally to all the sons, (b) could usually be disposed of by will, even before the Statute of Wills, (c) did not escheat in

¹ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 295; Digby, Hist. Law R. P. (5th ed.) p. 47.

² Lit. § 165. Littleton tells us that the reason for this custom was because the youngest son, on account of his tender age, is not as capable of taking care of himself as are his brothers. Other writers have ascribed it to the ancient right of concubinage by the lord with his vassal's wife on her wedding night, and the consequent doubt as to the oldest child being the child of her husband. For a discussion of this custom, see Elton, Origins of English History, ch. viii. p. 183.

³ The attempts to explain the com-

parative independence of the Kentish men have been numerous and varied. But the suggestion in the text seems to harmonize most nearly with their known characteristics and position, and with the results of the most recent and thorough historical research. See 2 Poll. & Mait. Hist. Eng. Law, p. 272. "Possibly," says Digby, in summing up another theory, "the very fact that the hand of the conqueror fell so heavily and at so early a date on the great men of the country operated to preserve the old customs amongst the poorest freeholders, whose insignificance was their best protection." Digby, Hist. Law R. P. (5th ed.) p. 47, n. 2.

case of attainder and execution for felony, the maxim being "the father to the bough, the son to the plough," and (d) could be aliened by the tenant at the age of fifteen.¹ The first of these characteristics is still a feature of gavelkind lands, as distinguished from other tenures in England.²

§ 269. 3. **Villein Socage — Unfree Tenures.** — Many species of tenure, which were doubtless marked with sufficient clearness in the times when they flourished in full vigor, have greatly puzzled the lawyers of later ages. Of the different forms of unfree tenures, this is particularly noticeable. They were all included within the general term *villeinage*,³ and were readily distinguished from the military holdings, in that their services had nothing to do with warlike operations, but were always humble and base in character, such as personally ploughing the lord's land, doing his chores, or carrying out the dung from his stables. It seems safe to say, also, that the service or return of every unfree holding was *uncertain* in its nature, in the sense that it depended to some material extent upon the will of the lord. Custom, or contract, or both, might fix, — and usually did fix, — the amount of work which the vassal must perform; but if when he went to bed at night he knew that he must spend the morrow in working for his lord, but did not know to what kind of work he might be put, his holding was by villeinage of some kind.⁴ When this uncertainty was so great that the holder of the soil was practically a slave, annexed to the land and passing with it, and having his services limited in amount by nothing but the customs of the manor, of which customs the lord himself was the ultimate though usually equitable arbiter, the holding was by *pure villeinage*. And when the services were thus uncertain from day to day, but of an amount beyond which the lord could be prevented from

¹ 2 Blackst. Com. p. * 84.

² Digby, Hist. Law R. P. (5th ed.) p. 47, n. 2. As to the effects of Kentish tenures on holdings of land in America, see § 246, *supra*.

³ "The name 'villeinage' at once tells us that we are approaching a region in which the law of tenure is, as matter of fact, intertwined with the law of personal status; 'villeinage' is a tenure, it is also a status. On the one hand the tenant in villeinage is normally a villein; the unfree tenements are held by unfree

men; on the other hand, the villein usually has a villein tenement. Then again, the *villanus* gets his name from the *villa*, and this may well lead us to expect that his condition cannot be adequately described if we isolate him from his fellows; he is a member of a community, a villein community," — a villa. 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 358.

⁴ Bract. lib. iv. cap. 28, fol. 208; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 369-375.

exacting,—and as to such holdings this was true only of lands which had been held of the king, in *ancient demesne*, so-called, since the Conquest,—the tenure was by privileged villeinage, or *villein socage*. The latter of these will be first more fully described.

§ 270. **Origin and Incidents of Tenure by Villein Socage.**—“There is also another kind of villein tenure, which has been held of our lord the king ever since the conquest of England. This is called villein socage, and it is a villein tenure but of a privileged kind. Thus the tenants of the *demesne* of our lord the king have this privilege, that they cannot be removed from the land as long as they are willing and able to render the services which they owe, and villein socmen of this kind are properly said to be bound to the land. Moreover, they render villein services, but the services are fixed and ascertained. Nor can they be compelled contrary to their desire to hold tenements of this kind, and therefore they are called free. Further, they cannot make a gift of their tenements, or transfer them to others by title of gift, any more than pure villeins can, and therefore if the tenements have to be transferred, the tenant surrenders them to the lord or his bailiff, and the lord transfers them to other persons to be held in villeinage.”¹

Tenants of the character thus described by Bracton were those who held in *ancient demesne*, so called, the lands which were actually in the hands of the crown in the times of Edward the Confessor, or William the Conqueror,² and possibly other lands which, subsequently being acquired by the king, were treated in the same way in dealing with this favored class of villein holders.³ It was a general principle of feuds that their sale or transfer from one lord to another should not affect the nature of the vassals' holdings. And, therefore, when the king parted with ancient demesne lands thus held of him by villein socage, the same kind of tenure continued under the new lord.⁴ But it was only of such lands that this species of holding existed. If we repeat that, when Bracton says the services were fixed and ascertained, this is to be taken to mean simply that there was always a very reasonable limit to their

¹ Bract. lib. iv. cap. 28, fol. 208.

² 2 Blackst. Com. p. *99.

³ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 383, 384.

⁴ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 385.

amount, but the tenant must work at the lord's bidding up to that amount; and if we emphasize the fact that such tenants were given a peculiar process, called the "little writ of right close," by which they could prevent the lord from removing them from the land against their will,¹ we summarize the most notable features which distinguished this tenure from that in pure villeinage. On the ancient demesne, then, there were freeholders, villein sokemen, and pure villeins; while on all other lands the tenants were all embraced within the two general classes, freeholders and pure villeins. The tenure of the latter and its important development are to be next examined.

§ 271. 4. **Pure Villeinage.** — The pure villein was a pure slave, except that, for land which he held, he was permitted, like other vassals, to take the oath of fealty, and the customs of the manor always regulated, to some extent, the quantity of services which the lord could require him, as such holder, to perform.² But, if those customs were violated to his injury, the pure villein tenant had practically no remedy; for the only court in which he could be heard was the manor court of his own lord, who had done or permitted the wrong.³ In the last analysis, therefore, his services were not only *base* in character, but also *uncertain* as to both time and quantity. It was a rare circumstance, however, for the lord to break through the manorial customs and exact from his villein more burdensome services than they fairly required.⁴

These lowest holders of land were in early ages either villeins *regardant*, that is, annexed to the land and passing with it, or villeins *in gross* or at large, that is, attached to the person of the lord and transferable by deed from him to another owner.⁵ They were, in a word, the lord's property, recoverable in an action at law if they ran away or were stolen, and unable to leave the land without his permission. The villein's children (called *nativi*) belonged in like manner to the lord; and if a

¹ For a description of this peculiar writ, see 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 386. It was a quickly operating writ; and Britton tells us that the reasons for its existence for the benefit of villein sokemen was that they were the tillers of the king's soil, and disputes about that soil should be settled by rapid and simple processes. Britton, ii. p. 13.

² 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 356, *et seq.*

³ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 359, 360.

⁴ 2 Blackst. Com. p. *93; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 361, 362.

⁵ 2 Blackst. Com. p. *93.

female villein (who was called a *neife*) were married without his consent, he had the right to a fine from her father,¹ and an action for damages against her husband for thus taking away his property.² The lord might beat or chastise his villeins with impunity; yet, as the king's subjects, they were given redress for atrocious injuries by him, such as mahem or rape; and he was liable criminally for killing or violently injuring a villein.³ It sometimes happened, even with such servile vassals as these, that their services were all commuted for a fixed rent, while they still remained thus attached to the land.⁴ This was usually among the first steps in the development of their holdings into copyhold tenure,—the species of tenure next and last to be examined.

§ 272. 5. Copyhold Tenure — Development and Nature. —

When tenure in pure villeinage is said to be unfree, this must be understood as referring distinctively to the *tenure*, and not necessarily describing the personal *status* of the tenant. For, as a matter of fact, throughout all the feudal ages, villein tenements were frequently held, and the services for them were rendered or supplied, by men who were not villeins, but in their persons were free. In process of time, moreover, many of those who themselves had been villeins were emancipated; and yet they and their descendants continued to hold the land in the same manner in which they had held it before obtaining their freedom.⁵ While all these vassals undoubtedly held at first merely at the will of the lord, yet, by the customs which gradually grew up around such holdings in the manors where those customs ultimately became matter of record upon the rolls of the various manor courts or courts baron, the will of

¹ This obligation to pay for the privilege of giving his daughter in marriage was called *merchet*, and it affords an instructive instance of the practical slavery of the pure villein. Speaking of this and similar burdens, Pollock and Maitland say, in their history of English law (2d ed.), vol. i. p. 368: "Our Stukeley virgater pays '*merchet*,' as best he may, that is to say, if he wishes to give his daughter in marriage he must pay money to the lord, and the amount that he has to pay is not fixed. If he has a foal or calf born of his mare or cow, he must not sell it without the lord's leave. If he has an oak, ash, or

pear-tree growing in his court, he must not fell it, except for the repair of his house, without the lord's leave. When he dies, his widow shall pay a heriot of thirty shillings and be quit of work for thirty days. These are common features, and the *merchet* is of peculiar importance, as will be seen hereafter."

² 2 Blackst. Com. p. *93.

³ 2 Blackst. Com. p. *94; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 412, *et seq.*

⁴ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 375.

⁵ 2 Blackst. Com. pp. *94, *95.

the lords came to be largely controlled and regulated; and, although there was for a long time no means of enforcing these customs by judicial action against the lord, yet they were deeply rooted in the usages and habits of the people, and any lord who ventured to set them aside and deprive the landholder of their benefit must have been exceptionally grasping and regardless of public opinion.¹ Gradually the king's courts of common law came to recognize and enforce these customs, which had thus grown up within the different manors and were evidenced by the entries on the rolls of the manor courts. And the tenant, who being now free could contend with his lord in any of the king's courts, became thereby enabled, by proving his right by means of a copy of the rolls of the manor court, to retain his land even against the will of his lord.² The copy of those rolls was, therefore, his only muniment of title; and he was accordingly said to have his land by *copyhold tenure*. In brief, then, a copyhold estate may be defined as one which, being originally held in pure villeinage at the will of the lord, came in process of time, by virtue of long continued possession according to fixed customs, to be held by the tenant in spite of any determination of the lord's will, but upon the same services as before and in conformity to the established customs of the manor; the customs being usually proved in the higher court by copy of the rolls of the respective courts baron (manor courts) in which they were entered.³

§ 273. **Survival of Copyhold Tenures.** — Except as they were affected by their special local customs, copyhold tenures came by degrees to have the same characteristics as the free tenures. There is, at the present time, a large though gradually decreasing amount of land in England which is subject to tenure by copyhold. But, of course, villein socage and pure villeinage have long ago disappeared. "It might have been expected," says a recent writer,⁴ "that so anomalous a class of rights as that which constitutes copyhold tenure would before the pres-

¹ 2 Blackst. Com. pp. *95-*98; Digby, Hist. Law R. P. (5th ed.) p. 288, *et seq.*

² "The great step seems to have been the recognition of the right of the tenant in villeinage to maintain an action of trespass against his lord." Digby, Hist. Law R. P. (5th ed.) p. 291. And Digby adds, in a footnote: "It was held in a case reported in the Year Book, 7

Edw. IV. p. 19, that this was the appropriate remedy, and not a writ of subpœna, i. e. an application to the jurisdiction of the chancellor."

³ See Bouvier's Law Dict. "Copyhold;" Burrill's Law Dict. "Copyhold."

⁴ Digby, Hist. Law R. P. (5th ed.) p. 294.

ent time have been assimilated to the other forms of property in land. This, however, has not been done. Copyholds might at any period have been enfranchised (or converted into freeholds) by the conveyance of the freehold by the lord to the copyholder, or extinguished by surrender of the copyhold by the tenant to the lord.¹ Various acts have in recent times created facilities for this process by providing means for the assessment and commutation of the lord's rights and otherwise; and at the present day either lord or copyholder may compel enfranchisement by taking the proper steps through the action of the Board of Agriculture."

§ 274. **Manors.**—The different forms of tenure have been above described as separate and distinct. And so they were in theory, and largely so in practice. But the finer distinctions between them varied much in different ages and are often hard to catch even at any given time. One vassal, moreover, might hold various pieces of land by different tenures and of different lords. He could have one parcel of A by free and common socage, another of B by knight-service, another of C by a form of serjeanty; and, even as a free man, he might render or supply servile labor to one of these or to some other lord for land held by an unfree tenure.² The system of feuds was thus more complicated than a discussion of the few forms of tenure which it produced might at first thought indicate. But it was largely saved from intricacy by the division of most of the land into manors, the orderly distribution of the domain within

¹ It is to be again carefully noted that the enfranchisement here mentioned refers to the *tenure* and not to the tenant. The tenants or holders of to-day are all free men; but their copyhold lands are held by a tenure which is designated unfree, because it is the representative of the base tenures of medieval times. To enfranchise it now would be to make the holding of the land tenure by free and common socage. See *Wappett v. Robinson* (1903), 1 Ch. 135.

² Pollock & Maitland [Hist. Eng. Law (2d ed.), p. 296] thus describe the holdings of Sir Robert de Aguilon, at the time of his death in 1287: "He held lands in Greatham in Hampshire of the king at a rent of 18s.; he held lands at Hoo in Kent of the abbot of

Reading at a money rent; he held lands at Crofton in Buckinghamshire of William de Say by some service that the jury did not know; he held a manor in Norfolk of the bishop of Norwich by the service of a sixth part of a knight's fee and by castle-guard; he held a manor in Sussex of the Earl of Warenne by the service of one knight; he held a manor in Hertfordshire of the king in chief by the serjeanty of finding a foot-soldier for forty days; he held tenements in London of the king in chief by socage, and could bequeath them as chattels. So we must not think that each man fills but one place in the legal structure of feudalism. In a remote past this may have been so; but it is not so in the age that defines the various tenures."

each of these among the various classes of tenants and the primitive yet systematic administration of their affairs by the manorial courts or courts baron.

A manor was a large tract of land, originally granted by the king to a person of rank, portions of which (*terræ tenementales*) were let out by the grantee or *mesne* lord to his vassals.¹ No exact quantity of territory marked the extent of all manors: some were larger, some smaller, but all were extensive and important tracts; each was a unit in the system of agriculture and the management of property, and in each its lord held a court which was called the court baron or manor court.² A greater lord was often the proprietor of more than one of these tracts; and, in addition to a court for each of his manors, he would sometimes have a central court for the principal freeholders of them all.³ Each manor was divided roughly into four parts. (a) The lord kept in his own hands as much land as was reasonably required for the use of himself and his family, his bailiffs and servants. This was his *demesne* land, and on it was located his house or homestead. (b) Another portion was assigned to the freeholders within the manor; i. e. those who held by free tenure, such as knight-service, free socage, etc. (c) Still another part was held and cultivated by the unfree vassals; and, when the land was held by the lord in ancient demesne, some of such vassals were free sokemen, while others were pure villeins. (d) Lastly, there was uniformly a fourth part of the manor which was left waste or uncultivated and used for public roads and pasture lands or commons for the lord and all his tenants.⁴ Doubtless the various tenements of these four distinct legal portions lay intermingled, as convenience or order of distribution might dictate; different portions of the manor would remain waste or uncultivated in different years, and the tenure of a given piece of the land would sometimes change from one kind to another. But, at any point of time, the complete manor had these four clearly distinguished species of tenements.⁵ And, for settling property disputes among his tenants and for redressing misdemeanors and nuisances, the lord's court baron had jurisdiction through-

¹ Bouvier, Law Dict. "Manor."

² 2 Blackst. Com. p. *90.

³ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 597.

⁴ 2 Blackst. Com. p. *90; 2 Sulliv.

Lect. 62, 63; Wms. R. P. p. *119; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 364.

⁵ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 364.

out the manor. It is from the records of the manorial customs and rights, inscribed upon the rolls of this court, that the copy was obtained, which, as above shown, constitutes the only available evidence of his title for the copyhold owner of land.¹

Not all the lands in England were thus included within manors; but the manor constituted the property and jurisdictional unit of most of the holdings. Manors existed before the conquest. They were then, and for some time during feudal supremacy, largely coincident in extent with the vills (*villas*); and, as time advanced, a process is discernible by which some of them developed ultimately into boroughs of modern times.²

Descent and Alienation of Realty, as affected by Feuds.

§ 275. **Duration of the Vassal's Holding.**—There can be little doubt that in Anglo-Saxon times, when the holdings of land were chiefly alodial, men generally owned them in such a way that they could at pleasure dispose of them by will, or by deed or other act *inter vivos*, and upon the death of their owner intestate they could descend to his heirs at law.³ But the entire theory and structure of the feudal system were opposed to such absolute power of disposition. The lord selected his vassals with special reference to their personal characteristics. He wanted them to be always ready and able to fight for him in the wars, or promptly and faithfully to render the other services which were his due. He therefore naturally objected to the tenant's alienation of his land, without his consent, to a stranger; and he hedged about the right of inheritance with such incidents as relief, primer seisin, wardship and marriage, as a compensation to himself for accepting as tenant a minor heir, who was a female or too young for warfare, in place of the deceased ancestor, who had been a brave and capable knight.

¹ § 272, *supra*. The existence of the manor court was, perhaps, the crucial test of the actual existence of a manor. If there ceased, at any time, to be enough freeholders (at least two) to hold this court, the manor ceased to be. 2 Blackst. Com. p. *90. "We are inclined to think," say Pollock & Maitland [Hist. Eng. Law (2d ed.), p. 605], "that the mere fact that a certain tract of land or a certain complex of rights was a *manorium* had no immediate legal

consequences. In particular, it seems to us that the men of the time would generally have argued from the court to the manor, rather than from the manor to the court, and would have said, 'A single court is held for it, therefore it is a manor,' rather than 'It is a manor and therefore it has a court.'"

² See 1 Poll. & Mait. Hist. Eng. Law, ch. 3, §§ 7, 8.

³ § 247, *supra*.

Hence the completion of our outline of feudal holdings requires a brief discussion of their effects upon (a) the descent of real property from ancestor to heir, (b) its alienation by will, and (c) its alienation by deed or other act *inter vivos*. And, in connection with these, seisin and disseisin of real property must be explained.

§ 276. (a) **Descent of Feuds.** — Although we can not state the exact times when the changes occurred, yet it is certain that, from being in their original form mere precarious holdings (or *benefices*) retained purely at the will of the lord,¹ feudal lands came gradually to be let out for a short fixed period, as for a year at a time; then by degrees they were given over to the tenants for life; and finally, as stress was laid on the hardship of depriving children of that which their father had held as his own, feuds became hereditary and were ordinarily bestowed upon the vassals for themselves and their heirs.² The transfer of tenements thus to a man "and his heirs," when first employed, was regarded as giving them to him while he lived *and then to his heirs*; and the relief which the heir must pay upon taking up the land after the death of his ancestor was a natural and direct outgrowth of this theory.³ But the later and permanent construction of those words was that they were simply the technical, legal means of indicating that the vassal himself, the first taker to whom the lord gave the land, was to have the perpetual ownership of it, so that, upon his death still owning it, it might descend by operation of law from him to his heirs.⁴ This result emerged in England not long after the Conquest. And there quickly followed upon it the rule of primogeniture, by which in most parts of that country, even down to the present time, the oldest son is the sole heir; while, if there be daughters but no son, they share the property equally, as together constituting the heir of their father.⁵

§ 277. (b) **Alienation by Will.** — The disposition of real property by will, in common-law jurisdictions, and the effects of feudalism upon it may be outlined in six distinct historical periods as follows:

Anglo-Saxon Period. — Before the Norman Conquest, owners of lands *could* will them away at death; and, although

¹ § 251, *supra*.

² 2 Blackst. Com. p. * 55.

³ § 256, *supra*.

⁴ See 2 Poll. & Mait. Hist. Eng. Law, ch. 4, §§ 1, 2.

⁵ 2 Blackst. Com. pp. * 211-* 216; Digby, Hist. Law R. P. (5th ed.) p. 421.

there were doubtless some restrictions placed upon their right to do so, such for example as the payment of a heriot to the king for his consent, yet it is now quite well established, especially as to such owners who had large means and high rank, that they more often died testate than intestate as to their property both real and personal.¹

Feudal Period. — Even after feuds came to be heritable, it was thought to be an injustice to the lord that the tenant should devise them to persons who might be wanting in those personal qualities for which he had been chosen as vassal. The heir, the blood relative of the deceased tenant, would probably have some or all of the same characteristics which had commended the tenant himself to the lord. But a devisee of the land might be an entire stranger, possibly an enemy of the lord, or one whom for other reasons he would not willingly accept as vassal. The result was that, except in some favored localities, as in Kent with its gavelkind customs, feudalism soon destroyed the power of every one but the king to will away the complete legal title to lands in England.² But, during the fourteenth century, the system, which was fostered and developed by the courts of equity, of having the legal title to lands and tenements held by one person *for the use* or benefit of another who thus got all the utility and enjoyment of the property, did away with the difficulties which otherwise would have arisen. Equity treated this owner of the use as the real owner of the land, and compelled the holder of the legal title to recognize the use in favor of him to whom it was given and any one to whom he might will it away. And, by the beginning of the fifteenth century, the system was complete whereby an owner of land, who desired to devise it, deeded it away to some one else to hold to his own use, or to the use of any one whom he might designate, and then willed away the *use* which he had thus put at his own disposal. It thus came about that, from the time of the complete introduction of feuds into England to the 27th year of Henry VIII. (1535), when the famous Statute of Uses (hereafter explained) was enacted, the one important method of disposing of interests in real property by will was by the devising of

¹ See 2 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 320-322; Digby, Hist. Law R. P. (5th ed.) pp. 13, 15.

² Glanv. vii. 1; 2 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 325-332.

But an interest in real property for merely a term of years, such interest being a *chattel* real, could still be disposed of by will the same as other personal property.

uses in lands which were held for the benefit of the testators and their devisees.¹

Period under Statute of Uses.—The statute of uses, enacted in 1535 (27 Hen. VIII. ch. 10), provided that the legal title should follow the use—that a grant or transfer to A for the use of B should give to B all the ownership including the legal title. And, since under the feudal theory this legal title could not ordinarily be the subject matter of a devise, and it must now follow the use, it was decided that this statute had destroyed all possibility of merely devising the use.² There were practically no wills of realty in England for five years thereafter—until the enactment of the Statute of Wills in the thirty-second year of Henry VIII.

Period under Statute of Wills.—By the statute 32 Hen. VIII. ch. 32, § 1, which was interpreted and explained by that of 34 and 35 Hen. VIII. ch. 5,³ all persons except married women, infants, idiots, and persons of unsound mind were enabled to devise, by will in writing, all their lands held by socage tenure and two-thirds of those held by knight-service. And, by virtue of those acts, testators disposed of such lands by wills—the only requisite of which was that they should be in writing—until the enactment of the Statute of Frauds, 29 Car. II. ch. 3 (1677).

Period under Statute of Frauds.—By the last mentioned act, it was made a necessary condition of a will of real property that it should be signed by the testator, or by some other person in his presence and with his knowledge and consent, and be attested and subscribed by at least three credible witnesses.⁴ Under this famous statute, real-property wills were made in England and the various states of this country, until modern legislation in each jurisdiction respectively prescribed the requisites of such dispositions of realty.

¹ 2 Blackst. Com. pp. *374, *375; 2 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 233-239.

² This was not a necessary decision (if it were even logical) from the wording of the statute and its operation. The courts might logically have held that a testator's will of the use in itself passed nothing but the use, and that then the statute carried the legal title to the devisee. But, as a matter of fact, they decided that, since the legal

title must follow the use, to devise the use was in effect to devise the legal title, and, since this latter was forbidden by the law of feuds, the statute had done away with all wills of interests in realty.

³ The first act was loosely and artificially drawn, and needed the later statute, which was full and explanatory.

⁴ The statute said "three or four credible witnesses," which, of course, meant three or more.

Period under Modern Statutes.—The English statute which now regulates wills of property, both real and personal, went into operation January 1, 1838 (Act of 1 Vict. ch. 26, as modified and explained by 15 & 16 Vict. ch. 24).¹ That of New York took effect January 1, 1830. (a) And so in each state the modern wills legislation particularly prescribes the method by which real property may be devised.

§ 278. (c) **Alienation by Act Inter Vivos.**—It was explained above that, during the Anglo-Saxon period, book-lands were probably freely alienable by deed as well as by will, while the folk-lands were clogged with important restrictions in this respect. It was also shown that the book-lands, with their alodial characteristics, continued to be held as such for some little time after the Conquest; and then came, like all other real property, under the absolute control of the feudal system.² It is now impossible accurately to determine the restrictions which the feudal polity imposed upon the power of the tenants or vassals voluntarily to transfer their holdings and put other owners in the places which they themselves had occupied. But it is certain that, even after the heir's power to obstruct his ancestor's disposition of land was lost,³ the lord could prevent direct alienation which would operate to his detriment.⁴ Being thus hampered in regard to so important an incident of property ownership—the right to dispose of it as they might wish—the vassals early resorted to *subinfeudation* of their

(a) The requirements of the New York Statute as to the execution of wills are quoted p. 106, note (a), *supra*.

¹ The principal requirements of this statute are that the will shall be in writing, signed at the end by the testator, or by some other person in his presence and by his direction, that his signature shall be acknowledged by the testator in the presence of two or more witnesses present at the same time, and that the witnesses shall attest and subscribe the will in the presence of the testator.

² §§ 247–249, *supra*.

³ As long as the transfer of real property to one “and his heirs” was regarded as in itself bestowing an interest upon the heirs, they could prevent the ancestor from alienating against their will. The inheritance belonged

already to the heir; and the ancestor could not dispose of it. But when it became settled, as it did even before *Magna Charta*, that a conveyance to A “and his heirs” gave the entire and absolute ownership to A and nothing to his heirs, it followed that they could not place any restrictions upon his alienation of every estate and interest in the land. If he died without having disposed of it, they could inherit it from him; but they could not insist on his keeping it till he died, or for any other period. Bracton, lib. ii. cap. 19, fol. 45; Digby, Hist. Law R. P. (5th ed.) p. 162.

⁴ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 329–340.

tenements; that is they handed them over to others to hold of themselves, while they retained the position of tenants to their original lords. Thus, if A were the lord and B the vassal, and B, desiring to sell his feud, met with objections or restrictions emanating from A, B transferred the property to C to hold of B; and thus C became the vassal of B and not of A, while B, instead of ceasing to have any interest in the land as he would have done if he could have sold it outright, retained his position and obligations in regard to it as the vassal of A.¹ B might treat his entire feud, or any portion or portions of it, in this manner.² Even upon this method of subinfeudating, however, there seem to have arisen by custom some restrictions in favor of the lord. And the statutes hereafter described, which curtailed and ultimately destroyed subinfeudation, at first merely defined and then amplified pre-existing restraints.³

§ 279. *Effects of Magna Charta on Alienation Inter Vivos.* — The difficulty, which subinfeudation was constantly producing or threatening for the lords, was that, while it still left them against their own tenants the rights incident to tenure, such as aids, relief, marriage, wardship, and escheat, it might seriously diminish the value of those rights. If, for example, a tenant by knight-service subinfeudated the tenement to another to hold at a yearly rent of a pound of pepper, and then died leaving an infant heir, his lord, instead of being entitled to enjoy the land itself till such heir became of age, could merely recover from the sub-feudatory a pound of pepper annually during that time. And, if the vassal who had thus subinfeudated died without heirs, his lord, instead of obtaining by escheat the absolute use of the land, received only the rent paid by the subtenant.⁴ The first attempt to obviate such difficulties by statute was made in the *Magna Charta* of 1217, which enacts that "No free man shall henceforth give or sell so much of his land as that out of the residue he may not sufficiently do to the lord of the fee the service which pertains to that fee." If the tenant presumed to convey more than was thus permitted, the excessive gift or sale could be avoided by his lord.⁵

¹ 2 Blackst. Com. pp. *91, *92; Digby, Hist. Law R. P. (5th ed.) pp. 234, 235.

² 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 330.

³ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 343.

⁴ 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 330.

⁵ Charter 1217, ch. 39; Coke, 2d inst. 65.

§ 280. **Effects of the Statute of Quia Emptores on Alienation Inter Vivos.** — But this restriction of *Magna Charta* proving to be vague and unsatisfactory, the entire system of subinfeudation was swept away by the statute of Westminster III., or *Quia Emptores* [18 Edw. I. ch. 1 (1290)], which is a very important landmark of real-property law. It declared that every free man might sell at his own pleasure his lands and tenements, or any part of them, but so that the transferee should hold of the same lord and by the same services and customs, of whom and by which the transferor had held. The services were to be ratably apportioned if only a part of such lands or tenements was sold by the tenant.¹ The statute applied only to the alienation of the entire fee simple — the entire interest or estate — of the land sold; and did not prevent a tenant from creating a species of subtenure by letting out the land for life or any other period shorter than his own interest, retaining for himself the residue of interest, called the “reversion,” and having the person to whom he thus sublet as his own tenant.² Neither did the act apply to the tenants *in capite*; but it, and the subsequent enactments called *Prerogativa Regis* [17 Edw. II. ch. 6 (1324), and 34 Edw. III. ch. 15 (1361)], left it as a part of the king’s prerogative to permit or prevent at will direct alienation or subinfeudation by those who held immediately of him.³ The net result was the effectual checking of all subinfeudation, except such as the king allowed his own tenants to make, and the enabling of all free landholders but those who held directly of the crown absolutely to alienate their entire estates and interests in all or any parts of the tenements which they held in fee simple. The king could still collect fines from his vassals for granting to them the privilege of selling; but the *mesne* lords had no control over alienation of the fee simple by their tenants, except the power to require

¹ See the statute in full in Digby, *Hist. Law R. P.* (5th ed.) pp. 236–239. “The statute is a compromise; the great lords had to concede to their tenants a full liberty of alienation by way of substitution — substitution even of many tenants for one tenant — and thus incur a danger of losing their services by the process of apportionment; on the other hand, subinfeudation with its consequent depreciation of escheats, wardships and marriages was stopped.”

¹ Poll. & Mait. *Hist. Eng. Law* (2d ed.), p. 337.

² The words of the statute are: “And it is to wit that this statute extendeth but only to lands holden in fee simple.” See Digby, *Hist. Law R. P.* (5th ed.) p. 238; 1 Leake, 19, 317; Challis, *R. P.* 18, 20, 30.

³ 2 Blackst. *Com.* pp. *91, *92; 1 Poll. & Mait. *Hist. Eng. Law* (2d ed.), p. 337.

that when they sold they should sell outright. This meant that permanent new subtenures could not be made without the king's license: and consequently all manors existing in England at the present time, with the possible exception of a few expressly authorized by the crown, and all holdings in fee simple of any lord other than the king must have been created before the Statute of *Quia Emptores* went into operation.¹

§ 281. **Statute De Donis — Summary as to Alienation Inter Vivos.**— It is to be added that, five years before the enactment of the last-named statute, estates tail, i. e., interests in land conveyed to one *and the heirs of his body* as distinguished from his heirs generally, were rendered wholly inalienable by the Statute *de Donis Conditionalibus*.² The exact nature of such estates or interests in land, and the operation of the Statute *de Donis Conditionalibus* upon them will be explained hereafter; and how they have since become alienable will be described. But the general effect of that statute is here noted for the sake of completeness in dealing with the question of alienation of real property. And, if now we look at all possible interests in such property immediately after the Statute of *Quia Emptores* took effect, we arrive at the following summary; namely, (1) subinfeudation of tenements held in fee simple was impossible, except by the king's tenants pursuant to his license; (2) all tenements held in fee simple of any one but the king could be freely aliened outright; (3) estates tail could not be aliened at all; (4) all lesser interests in real property, such as estates for life or for terms of years, could be clogged with any reasonable restrictions as to alienation which the parties saw fit to impose.

§ 282. **Restrictions on Alienation removed by Statute 12, Car. II. ch. 24 — Present Results.**— Since the Statute of *Quia Emptores* became a law, and as one of the logical and necessary consequences flowing from it, it has been impossible in both England and America for any one (except the king), who conveys real property in fee simple, to place any material restriction upon the power of the alienee himself to sell. Thus, the notion, so common to us, that we may dispose when and how we please of lands or tenements which are wholly and abso-

¹ Blackst. Com. p. *92; Wms. R. P. 119, 127; Digby, Hist. Law R. P. (5th ed.) p. 235. There have been a few new manors created by special

license from the crown since 1290. Challis, R. P. 19.

² Statute of Westm. II. 13 Edw. I. ch. 1 (1285), which see in full in Digby, Hist. Law R. P. (5th ed.) pp. 226-230.

lutely ours, is not an inherent common-law principle that has always operated; but it has its roots in that famous statute made practically necessary by the development of feudalism.

By the death of intermediate lords without heirs, the occasional surrender of their ownership to their superiors, etc., the ladders of feudal tenures gradually lost their rungs and were thus shortened, after the Statute of *Quia Emptores*, until most of the holders of real property came to be the king's tenants in chief.¹ That statute did not operate in favor of these latter; and thus the difficulties of tenure, especially as to those who held by knight-service, were constantly affecting more and more vassals. As soon as he lost the *mesne* lord between himself and the crown and so became a holder *in capite*, the tenant became subject to primer seisin, or fines for alienation, or both, in addition to all the other burdens incident to his tenure. Hence it was that the statute 12 Car. II. ch. 24 (1660), above explained more in detail,² was enacted to abolish practically all of those onerous appendages of the feudal holdings. Since that time alienation in fee simple, by all holders of land, has been substantially unrestricted, except as to the manner in which it must be accomplished. And the uniform method of transfer to-day, in both England and America, as prescribed by the statutes of frauds [based on that of 29 Car. II. ch. 3 (1677)], is by a deed in writing.³ (a)

Seisin.

§ 283. **Seisin defined and classified.** — The feudal idea of seisin is so inwrought into the entire structure of the law of

(a) In New York, the statute, which was formerly 2 R. S. 134, § 6, 135, § 7, and 137, § 2, and is now Real Prop. Law (L. 1896, ch. 547), § 207, provides that, "An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, can not be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent, thereunto authorized by writing. But this section does not affect the power of a testator in the disposition of his real property by will; nor prevent any trust from arising or being extinguished by implication or operation of law, nor any declaration of trust from being proved by a writing subscribed by the person declaring the same."

¹ Digby, Hist. Law R. P. (5th ed.)
p. 235.

² § 262, *supra*.

³ 1 Stim. Amer. Stat. L. §§ 4140, 4143.

real property that it is very difficult to understand and apply the reasoning of the courts, either ancient or modern, upon the subject, without a clear understanding of the unfolding and nature of that idea.¹

When first used in the common law, seisin meant simply and only possession. Before the end of the thirteenth century, it applied to the possession of chattels as well as land. Subsequently its meaning was restricted to the possession of lands and tenements. And finally, as its settled meaning, it came to involve the thought of a *freehold* interest in real property and either the possession or the right to the possession of the same.² When estates in real property are hereafter discussed, the nature of a freehold interest, or "freehold estate," will be fully explained. It will suffice here to say that it is an interest in realty for life or of inheritance. If A have a piece of land to hold during his own life or during the life of B, or for him and his heirs forever, or for him and the heirs of his body, he has a freehold estate in the same. Now, no one can be seised of realty without having either the possession or the unobstructed right to the possession of land, together with the claim therein of a *freehold* estate. When it involves actual possession it is seisin *in fact*; when there is no actual possession, but an unobstructed right to take possession exists, it is seisin *in law*. It is best, therefore, if a set definition be required, to say that seisin is a compound idea, involving seisin in fact and seisin in law: seisin in fact is the actual possession of real property together with the claim of a freehold estate in the same;³ seisin in law is the claim of a freehold estate in, and the present right to the possession of real property, which is not being held adversely by another.⁴ Thus, when one is actually occupying an acre of land, which he claims for his life or for himself and his heirs, he is seised in fact of that land. And when one owns an acre of land, the title to which has descended or been devised to him,

¹ "In the history of our law there is no idea more cardinal than that of seisin. Even in the law of the present day it plays a part which must be studied by every lawyer; but in the past it was so important that we may almost say that the whole system of our land law was law about seisin and its consequences." 2 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 29.

² Lit. 324; Co. Lit. 200 b, 201 a; 2 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 29-39.

³ Co. Lit. 266 b, n. 217; Com. Dig. Seisin, A; 2 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 40.

⁴ Ibid.; 1 Cruise Dig. tit. ii. ch. iii. § 34.

and he claims a freehold estate in it, but he has not yet taken possession of it, and no one is in possession holding adversely to him, he is seised in law of that land. It is thus apparent that seisin is quite different from mere possession. A trespasser, a licensee upon land, or a tenant for years or at will may have possession, and generally does so; but as such a holder he is not seised.¹ The possession of a tenant for years or at will, however, is ordinarily for the benefit of his landlord, the owner of the freehold estate; so that then the latter has the seisin in fact, because he both claims a freehold estate in the property and has possession of it through his tenant.² Incorporeal hereditaments, of course, can not be possessed, or manually held, in the same way as corporeal ones. But the right to receive the income, the rents and profits, from them is treated as equivalent to possession; and he who has this right at present and claims a freehold estate in the easement, franchise, or other kind of incorporeal hereditament, has the seisin thereof.³

¹ "We may say that the *animus* required of the person who is 'seised of free tenement' is the intent to hold that land as though he were tenant for life or tenant in fee, holding by some free tenure." 2 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 40.

² Bract. book ii. ch. ix. fol. 27.

³ 2 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 34, 39. It may be noted here that future interests in real property, such as remainders and reversions, are incorporeal in their nature, and that owners of them are sometimes said to be *seised*. There is no difficulty in understanding this when the preceding estate is only a term of years. Thus, if land be held by A for ten years, then to go to B for life or in fee, A takes possession *for* B; B has, therefore, the possession and the freehold estate, and is seised in fact. But when the first estate is a freehold, there is apt to be ambiguity created by speaking of the owner of the next or future estate as being seised. For, when A owns a piece of land for life, and it is then to go to B and his heirs, if A have possession, it is for himself, and he and not B has the seisin in fact. Yet B is often spoken of, under such circumstances,

as being seised of his future estate in reversion or in remainder. When the word seisin is thus used, it must be understood as employed in a broad, general sense which is closely synonymous with *ownership*. And such a use of the word must not be allowed to cause confusion as to its accurate and technical meaning above explained.

Also, in dealing with estates and interests which were developed under the Statute of Uses, those who have legal estates, either in possession, or in remainder or reversion, provided no one has wrongfully taken the land from them and reduced their interest to a mere right of entry, are often said by the courts and writers to be seised of the property, even though they have no possession. This, again, is a broader and looser meaning of the word than that given in the text; and this general use of it must not be allowed to cause confusion; 2 Prest. Abr. 282; Co. Lit. 266 b; Cook v. Hammond, 4 Mason (U. S. Cir. Ct.), 467, 489; 12 Law Quart. Rev. 239, 247. It has proved in some respects unfortunate that these loose and general meanings have been applied by the best writers to the word seisin. But the student will ordinarily avoid

§ 284. **Seisin not allowed to be in Abeyance.** — The common law, unaffected by statute, will never permit the seisin of real property to be lost or in abeyance, for an instant. There must always be some one in being, in whom the seisin resides.¹ This is a very stringent rule, which has often defeated estates and interests that otherwise would have been valid. If, for example, land were conveyed by deed to A for ten years, and then to a child not in being and his heirs forever, the common law would not allow that any interest be thus created for the child: and the reason was that, since A had only an estate for years, he had no seisin; there could be no seisin, of course, in a child not in being; and, therefore, such an arrangement, if allowed to be good, would put the seisin in abeyance until the child came into being.²

§ 285. **Only One Seisin at a Time — Adverse Claimants.** — There can be only one seisin at a time of a piece of real property. When two or more persons are in possession, holding it jointly or in common, the seisin is in all of them considered in law as a unit. When two or more are in possession, claiming freehold estates adversely to one another, the seisin resides in the one of them, if any, who has the *right* to the possession;³ and, if no one of them have any right, in the one who first acquired the possession.⁴ When seisin by any person or class of

uncertainty by regarding the word as used in its strict, technical sense, unless the context shows that it is being employed with a broader and more general signification. It is such a fundamental idea in real-property law that it must be frequently employed; and by most courts and text-writers it is generally used in its original and narrower sense.

¹ This was because there must always be some one, who was a freeholder, to render the services due to the lord; and also because there must always be a freeholder to answer in any real action which might be brought for the recovery of the property. Such an action had to be brought against the immediate freehold owner of the land, and the court writ served upon him was called the *præcipe*, this being the first word of the mandatory part of the writ, — *præcipe quod reddat*, etc. If there could have been any time during which there was no freehold owner

upon whom this writ could be served, the court would have lost jurisdiction of the land during that time. And the requirement that there should always be such an owner and holder was tersely expressed by saying there must always be some one who was “seised to the *præcipe*” of the land. 1 Prest. Est. pp. *208, *255; 1 Atk. Conv. 11. See *Wallach v. Van Riswick*, 92 U. S. 202, 212.

² This example illustrates one of the important common-law rules relating to contingent remainders, which will be fully discussed hereafter. See also 1 Prest. Est. 255.

³ *Barr v. Gratz*, 4 Wheat. (U. S.) 213; *Slater v. Rawson*, 6 Met. (Mass.) 439; *Means v. Wells*, 12 Met. (Mass.) 356; *Look v. Norton*, 55 Me. 103; *Monroe v. Luke*, 1 Met. (Mass.) 459, 466.

⁴ But if a person have possession without title, an intent to assert a freehold estate in the land must be proved,

persons is once proved or admitted, it is presumed to continue till the contrary is shown.¹ And, by virtue of modern statutes in most jurisdictions, the rightful owner of land which is unoccupied is deemed to have the possession and seisin thereof, until it is proved that he has been deprived of them by the actual possession and adverse claim of another person.² (a)

§ 286. **Disseisin.**—The act of ousting a person from land and depriving him of seisin is a disseisin. It involves not only dispossession, but also the claim (whether well founded or not) by the disseisor of a freehold estate in the land. It is the act which lays the foundation for the acquisition of title by adverse possession under modern statutes. In the common law, the disseisor, the wrongdoer, while he may be turned out by the rightful owner, either by actual re-entry by the latter or by process of law, has a defeasible title, and for many purposes acts done by him are as effectual as if he were the true owner. The person wrongfully ousted, the disseisee, has only the right to regain his possession and make his title again complete by an action at law or by re-entry. And one of these remedies—that by re-entry, or regaining his possession—is lost by his failure to exercise it in the proper way and within the proper time, or before the seisin passes from the disseisor to his heir by descent, or to any other person by feoffment and livery of seisin.³ The last-named method of transfer will be

(a) The New York statute says: "In an action to recover real property or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof, within the time required by law; and the occupation of the premises, by another person, is deemed to have been under and in subordination to the legal title, unless the premises have been held and possessed adversely to the legal title, for twenty years before the commencement of the action." N. Y. Code Civ. Pro. § 368. See *Deering v. Reilly*, 167 N. Y. 184, 192; *Lewis v. N. Y. & H. R. Co.*, 162 N. Y. 220; *Archibald v. N. Y. C. & H. R. R. Co.*, 157 N. Y. 574, 579; *Arents v. L. I. R. Co.*, 156 N. Y. 1, 9; *Doherty v. Matsell*, 119 N. Y. 646; *Yates v. Van De Bogert*, 56 N. Y. 526, 532.

in order to show that he has the seisin. *Bradstreet v. Huntington*, 5 Pet. (U. S.) 402; *Ewing v. Burnett*, 11 Pet. (U. S.) 41, 52.

¹ *Brown v. King*, 5 Met. (Mass.) 173.

² 1 Stim. Amer. Stat. L. §§ 1400, 1401.

³ Lit. §§ 385, 414, 417, 422, 593; Digby, Hist. Law R. P. (5th ed.) pp.

108-115. At common law, the disseisee could exercise his right of entry by actually re-entering upon the land; or, if he were prevented from doing this peaceably, by going yearly near the land and asserting his claim. This latter was designated a "continual claim." If he failed to assert his right in either of these ways, he might lose the power of doing so by the death of the disseisor in

explained in the following section. But it is to be added here that the common-law rules and principles as to disseisin and its effects are now largely modified by statutes, which will be explained in treating of titles to real property.¹

§ 287. **Livery of Seisin — Grant — Attornment.** — The common-law voluntary transfer of seisin of land from one to another was effected by a formal proceeding called "livery of seisin." The parties went upon the land to be conveyed, and in the presence of the other freeholders (*pares curiæ*) of the manor or of the same lord, the transferor delivered to the transferee, "in the name of seisin of the land," a twig, stone, piece of turf, or other article taken from the land; or sometimes he took off his coat and placed it upon the purchaser, as a symbol of a clothing of him (*investiture*) with the seisin and ownership of the property.² If for any reason they could not go upon the land, they went within sight of it, and the owner gave the other authority to enter; and this was effectual to pass the seisin and ownership, provided the transferee actually entered upon the land during the lifetime of the transferor.³ This latter method was designated "livery in law," while the former method, the proceeding upon the land itself, was "livery in fact."⁴ Either ceremony was ordinarily accompanied by a deed or charter of "feoffment," as it was called, which attested the livery of

possession or his alienation of his interest; and the disseisee would then be compelled to resort to legal proceedings to regain a complete title. By the death of the disseisor in possession, and the taking of his place by his heir, there was said to be a "descent-cast," which "toll'd" (or barred) "the entry" by the rightful owner. These technical principles, which are explained in full in the 10th chapter of 3 Blackstone's Commentaries, gave rise to much litigation and subtle refinement. Most of them were abolished in England by the statute 3 & 4 Wm. IV. ch. 27; and they have been done away with or modified by statutes in this country, so that title is now regained from a disseisor either by actually getting him out and retaking complete possession in a peaceable manner, or by the aid of the court through an action of ejectment.

¹ See preceding note.

² Bract. lib. ii. ch. xviii. fol. 39; Lit. § 59; Co. Lit. 48, 49; 2 Blackst. Com.

pp. *315, *316; Thoroughgood's Case, 9 Coke, 136 b. "Great importance was attached to the notoriety of the transaction. That all the neighbors might know that A was tenant to B, from the fact that open livery of seisin had been made to him, was of the utmost importance to B in order to protect and to enable him to assert his right as lord. For in case of dispute as to the title to the lands, or the right to services, aids, or reliefs, the fact of this open and notorious livery of-seisin enabled the lord to appeal to the tribunal before which, since the reforms of Henry II., suits relating to land were commonly decided, — the verdict of twelve *legales homines de vicineto*, who would know themselves or have heard from their fathers the truth of the matter." Digby, Hist. Law R. P. (5th ed.) p. 147.

³ 2 Blackst. Com. p. *316; also authorities cited in preceding note.

⁴ 2 Blackst. Com. pp. *315, *316.

seisin and stated the purpose, nature, and extent of the transfer. When a deed was thus employed, the entire transaction was known as a feoffment with livery of seisin.¹ And such a transfer, though now almost wholly obsolete, would still be effectual in passing title, in any jurisdiction where it has not been abolished by statute.² (a) Since a feoffment with livery of seisin operated merely by transfer of possession, it might be wrongfully made by one who had rightful temporary possession in behalf of the permanent owner of the land. Hence it was that a tenant for life or for a term of years could disseise the landlord, or succeeding owner of the freehold, by so disposing of the property. His act was known as a tortious feoffment or alienation, which was (and, where statute has not affected it, still is) a cause of forfeiture of the wrongdoer's interest in the property.³

There can be no livery of seisin of things of which there can be no actual manual possession. Therefore incorporeal hereditaments and future interests in corporeal property which the owner can not yet possess have always been incapable of transfer by feoffment and livery. A deed, which is called a "grant," has always been required for their conveyance. Hence the distinction, on which the common law laid much emphasis, between those things which "lie in livery" and those which "lie in grant."⁴ (b) A grant, not involving livery of

(a) In New York, feoffment with livery of seisin was abolished by the Revised Statutes, Jan. 1, 1830. 1 R. S. 738, § 136, which is now Real Property Law (L. 1896, ch. 547), § 206. For an illustration of such a transfer here before that date, see *McGregor v. Comstock*, 17 N. Y. 162, 164, 171. See also *Sparrow v. Kingman*, 1 N. Y. 242, 250, 251; *Varick v. Jackson*, 2 Wend. 158, 203.

(b) The New York statutes have made the grant the broad general form of deed for conveying both corporeal and incorporeal hereditaments; and, where other kinds of instruments are authorized for the transfer of freehold estates, it is declared that they shall be construed as grants. N. Y. Real Property Law (L. 1896, ch. 547), §§ 207-211.

¹ 2 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 83-90; Digby, Hist. Law R. P. (5th ed.) pp. 144, 145.

² In some of the United States, feoffment with livery of seisin is expressly abolished; and in many of them it is declared by statute to be unnecessary. 1 Stim. Amer. Stat. L. § 1470.

³ Lit. §§ 415, 416, 611; Co. Lit. 223 b, 330 b; Challis, R. P. 68, 110.

⁴ Co. Lit. 9 a, 49 a, 172 a; Shep.

Touchst. 228; Digby, Hist. Law R. P. (5th ed.) pp. 252-262. The grant of incorporeal hereditaments is a form of contract which was required to be in writing even before any statute of frauds was enacted. The grant has grown in favor in modern law, and, in many jurisdictions, has been made capable of transferring hereditaments, both corporeal and incorporeal, without any livery of seisin.

seisin, could not affect any interest in the property except that of the grantor; and, therefore, it could never take effect as a tortious conveyance.¹ When it was a transfer of the grantor's future interest in land, moreover, it was ineffectual at common law without the consent of the tenant who had the present possession. Thus, if a life tenant, or a holder for a term of years, were in possession of the land, the landlord or owner of the subsequent interest must obtain his consent to a grant of the future or permanent interest in the land. This was called technically an "attornment."² The necessity for it was done away with in England by the statutes 4 Anne, ch. 16, §§ 9, 10 (1706) and 2 Geo. II. ch. 19 (1729), and in most if not all of the states of this country it is likewise abolished by positive legislation.³ (a)

(a) In New York, "An attornment to a grantee is not requisite to the validity of a conveyance of real property occupied by a tenant, or of the rents or profits thereof, or any other interest therein. But the payment of rent to a grantor, by his tenant, before notice of the conveyance, binds the grantee; and the tenant is not liable to such grantee, before such notice, for the breach of any condition of the lease. . . . The attornment of a tenant to a stranger is absolutely void, and does not in any way affect the possession of the landlord unless made either: 1. With the consent of the landlord; or, 2. Pursuant to or in consequence of a judgment, order, or decree of a court of competent jurisdiction; or, 3. To a mortgagee after the mortgage has become forfeited." N. Y. L. 1896, ch. 547, §§ 213, 294. And see *O'Donnell v. McIntyre*, 118 N. Y. 156; *Austin v. Ahearne*, 61 N. Y. 6; *Fowler's R. P. Law of State of N. Y.*, pp. 496, 458.

¹ Lit. §§ 609, 610; 4 Kent Com. p. *490.

² Lit. §§ 551, 567, 568; 2 Blackst. Com. pp. *71, *72; 1 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 346-349.

³ 1 Stim. Amer. Stat. L. §§ 2008, 2009. The attornment by a tenant to a stranger might result in a disseisin or

dispossession of the landlord, and therefore often caused much difficulty. But it is now uniformly provided by the above-cited statute that such an attornment shall be void, unless it is made with the express or implied consent of the landlord or reversioner.

CHAPTER XVII.

HOLDINGS OF REAL PROPERTY IN THE UNITED STATES.

§ 288. Tenure before the Revolution.

§ 289. Alodial holdings since the Revolution.

§ 290. The state's rights.

§ 291. The Statute of *Quia Emptores*.

§ 288. **Tenure before the Revolution.** — Lands in this country, which were granted by the crown of Great Britain, were held by feudal tenure before the Revolution. They were granted to the colonial proprietors to hold in free and common socage;¹ but, as stated above, in most of the charters reference was made to the tenure that prevailed in the county of Kent; and thus the military and slavish part of feudalism was prevented from ever affecting the lands of the thirteen colonies.² (a) Little but the theory of that system ever operated here. The services reserved consisted for the most part of merely nominal rents, and sometimes there was nothing but the incident of fealty to mark the feudal relation. The burdens of feudalism, therefore, never materially affected real property in America.³

(a) Thus, the habendum clause of such a grant in New York provided that, "the lands shall be held by Palmer, in free and common socage, as of the manor of East Greenwich, in the County of Kent," etc. *Delancey v. Piegras*, 138 N. Y. 26, 35.

¹ Story, Const. 159; Sulliv. Land. Tit. 35; 2 Sharsw. Blackst. Com. p. 77.

² 1 Spence, Eq. Jur. 105, n. See § 246, *supra*.

³ 1 Story, Const. Law, § 172; 1 Gray's Cas. R. P. 407, note. There has been some discussion as to the nature of the king's title to lands which were in possession of the Indian tribes, and as to where the seisin resided before the extinguishment of their possessory right. This has but little bear-

ing, however, on the growth of our law; for it was held that the Indians had no element of title save that of occupancy, and when that was divested the entire system of English tenure was left free to operate. See *Clark v. Williams*, 19 Pick. (Mass.) 499; *Martin v. Waddell*, 16 Pet. (U. S.) 367, 409; *Fellows v. Lee*, 5 Denio (N. Y.), 628; *Johnson v. McIntosh*, 8 Wheat. (U. S.) 543; *Worcester v. Georgia*, 6 Pet. (U. S.) 515.

§ 289. **Alodial Holdings in most States since the Revolution.**

—The effects which the Revolution and the consequent change of sovereignty from the crown to the people of the state produced upon holdings of land have been the subject of much learned discussion. Professor Gray undoubtedly stated a correct logical conclusion concerning this matter, when he wrote: "It does not seem that so fundamental an alteration in the theory of property as the abolition of tenure would be worked by a change of political sovereignty."¹ And it is certain that in three of the most conservative of the thirteen original states, — New Jersey, South Carolina, and Georgia, — at least the *theory* of tenure always was retained and still prevails.² But it must be remembered that the feudal system mingled and confused property rights with political authority and responsibilities,³ and that the charters from the king to the colonial proprietors conveyed together, without making any very clear distinctions between them, both governmental jurisdiction and territorial proprietorship. Political sovereignty and overlordship of all their lands were thus confused in the minds of the colonists. They made no clear distinction between the king as a feudal lord and the king as a hated despot. And when the despotism had been thrown off, it was natural for them to assume that the feudalism had been done away with. They had brought with them, it is true, and retained in their systems of jurisprudence, most of the common and statute law of the mother country; but this they would inevitably modify as the nature of the times and the condition of the country required.⁴ And feudalism as a system was out of harmony with the American spirit. We should have expected, therefore, *a priori*, the result that followed, namely, that most of the old states and all of the new ones would declare by positive statute or

¹ Gray, *Perpetuities*, § 22, citing Sharswood, *Law Lect.* viii. 207–232; *United States v. Repentigny*, 5 Wall. 211, 267; 2 Blackst. Com. (Sharswood's ed.) p. 77, note, etc.

² 1 N. J. Gen. Stat. (1895) p. 879; Rev. Stat. S. C. (1873) p. 416; Georgia Code (1895), § 3051. In New Jersey, while by the above-cited statute tenure is retained in theory as to most land, yet grants from the state are declared to be alodial. The code of Georgia (§ 3051) says: "The tenure by which

all realty is held in this state is under the state as original owner. It is without service of any kind, and limited only by the right of eminent domain remaining in the state."

³ Maine Anc. Law (1st Am. from 5d London ed.), pp. 102, 103.

⁴ *Commonwealth v. Charleston*, 1 Pick. (Mass.) 180; *Commonwealth v. Alger*, 7 Cush. (Mass.) 53–82; *De Lancey v. Piepgras*, 138 N. Y. 26, 36. See *Luhrz v. Hancock*, 181 U. S. 567; 22 Lawy. Rep. Ann. 501.

judicial determination, or would tacitly assume, that all lands within their jurisdictions should be held and owned alodially. In Connecticut, New York, (a) Virginia, West Virginia, Kentucky, Ohio, Minnesota, Wisconsin, and California, and probably in some other states, statutory enactments, some in the form of constitutional provisions and others as ordinary legislative acts, have done away with all feudal incidents and made the lands alodial.¹ In Maryland and Pennsylvania the courts have declared, without the aid of statute, that no tenure exists.² And it seems to be perfectly safe to assert that, in the other states and territories where no affirmative law upon the subject is to be found, it has been assumed, and will always be maintained, that no real property within their jurisdiction is held under any feudal tenure or incidents.³

In a few of the states, however, where all traces of feudalism have long since disappeared, that system continued to

(a) The first constitution of New York (1777), Art. I. § 35, adopted for this state all applicable English statutes and colonial enactments down to April 19, 1775, the date of the battle of Lexington. Const. 1846, Art. I. § 17, Const. 1894, Art. I. § 17. By statute passed Oct. 22, 1779, which was made to relate back to July 9, 1776, all rights formerly held by the king in lands in this state were declared to be vested in the people of the state. The act in relation to tenures, which was passed Feb. 20, 1787, and made to relate back generally to July 4, 1776, abolished all tenures by one citizen or subject of another, and thus left tenure possible only by a subject holding immediately of the state. And the Revised Statutes (Part II. ch. i. tit. 1, § 3) which took effect Jan. 1, 1830, did away with all feudal tenures and made all real property within the state alodial. The constitution of 1846 embodied the results of these enactments in Art. I. §§ 12, 13; and that of 1894. in Art. I. §§ 11, 12, as follows:

"All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain which at any time heretofore have been lawfully created or reserved."

"All lands within this state are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates." See also note on New York manor lands, p. 389, note (a), *infra*.

¹ Conn. Rev. Sts. tit. 18, ch. 6, pt. 1, § 1; N. Y. Const. (1894) Art. I. §§ 10, 11, 12; Va 10 Hen. St. 50, 64, 65; 1 Lomax, Dig. 539; Ohio, 1 Chase St. 512, 528; Walker, Amer. Law, § 124; Wis. Const. (1848) Art. I. § 14; Minn. Const. (1857) Art. I. § 15; Cal. Civ. Code, § 762; 1 Stim. Amer. Stat. L. §§ 400, 401.

² Matthews v. Ward, 10 Gill & J.

(Md.) 443, 451; Wallace v. Harmstad, 44 Pa. St. 492. See Ingersoll v. Sergeant, 1 Whart. (Pa.) 337.

³ Matthews v. Ward, 10 Gill & J. (Md.) 443, 451; 4 Kent's Com. pp. *24, *25. But see Sharswood, Law Lect. viii. 207-232; 2 Blackst. Com. (Sharswood's ed.) p. 77, note; Smith, Landl. & Ten. (Amer. ed.) 6, note; Gray, Perpetuities, § 22.

affect some of the real property until a number of years after independence. Thus, in New York, large tracts of land were held as manors, by proprietors under the king, who became *mesne* lords by parcelling out the land as feudal holdings to inferior tenants. The state took the place of the king after the Revolution; but it was not until January 1, 1830, that the last vestige of feudalism was removed from those properties and their tenants or owners came to hold them alodially. (a) So, the

(a) *New York Manor Lands.* — Large tracts of land in New York, especially in the Hudson and Mohawk valleys, were formerly held as manors, subject to manorial rights and duties. Not only agricultural property, but also sections upon which cities and towns have been erected, were embraced within these tracts. Thus, the county of Albany was included within the manor of Rensselaerwyck, which had an area of over 1100 square miles. It is necessary for the examiner of titles in such districts to comprehend that part of the law of New York which has had to deal with these considerable portions of its territory.

These manors were patented by the King of Great Britain, to proprietors, to hold of him by perpetual rent in money or in kind, or they were acquired, to be so held; by the king's confirmations of grants made by the States-General of Holland, while the colony was under their control. Many of the patentees or proprietors were called *patroons*; and for convenience they will all be described by that word in this note. They were tenants *in capite*, and had the ordinary manorial privileges, such as the right to hold a court, award fines, and have waifs, estrays, and deodands.

The patroons subinfeudated their lands in fee simple; and their tenants or vassals, to whom they had thus let the lands to hold of themselves, became the tenants *paravail*. For there is no record of any attempt at further subinfeudation by any of those who held under the patroons. A perpetual rent, in money or in kind, was reserved in these subleases in fee. The rents due from the patroons to the crown, and subsequently to its successor the state, have in general been commuted or released for a gross sum; and the same is true of some of the rents due from the tenants *paravail* to the *mesne* lords, or patroons. But others of the latter kind are still in existence as charges upon the lands.

This system of dealing with real property in New York was attacked, both on behalf of the state claiming title to the lands by escheat, and by those who sought to avoid the rents and services due to the patroons. The chief grounds upon which the attacks were made were that the king had no power to issue such grants, that they had never been confirmed by the colony or state, and that the subinfeudations by the patroons were forbidden and nullified by the Statute of *Quia Emptores*. The first two of these positions were decided to be untenable (*People v. Van Rensselaer*, 9 N. Y. 291); and, while the last objection was at first obviated by holding that the Statute of *Quia Emptores* was never in force in New York (*De Peyster v. Michael*, 6 N. Y. 467, 501), it was ultimately settled that that statute has always operated in this state, but that, since it was enacted for the king's benefit, he might waive it, and had in fact waived it in allow-

Virginia statute, which abolished feudal tenures, was not passed until 1779,¹ and that of Connecticut was first enacted in 1793.²

ing the patroons to subinfeudate. But the patroons, who were *mesne* lords, were bound by the statute; and therefore their tenants did not and could not subinfeudate. *Van Rensselaer v. Hays*, 19 N. Y. 68. The outcome, then, of a long line of cases upon these questions is the determination that, before the Revolution, there were three valid interests or ownerships in these manor lands, namely, (1) that of the King of Great Britain, as lord paramount, (2) that of the patroons, as *mesne* lords, and (3) that of the tenants paravail, who held under the patroons.

The first change in this system was brought about by the Revolutionary War, which substituted the people of the state as lord paramount in the place of the king. This was expressly declared to be the result by the statute of Oct. 22, 1779, § 14, which was made to relate back to the ninth day of July, 1776. 1 *Jones & Varick*, 44; *De Peyster v. Michael*, 6 N. Y. 467, 503. The next change was that the Statute of Tenures, so called, which was enacted Feb. 20, 1787, abolished military tenures and all their incidents from August 30, 1664, changed all tenures of estates of inheritance into free and common socage from July 9, 1776, put an end to all feudal tenure between one citizen and another, and substituted in its place a tenure between each landholder and the people of the state in their sovereign capacity. This did away with the patroons, as *mesne* lords, and caused those who had been their tenants to hold immediately of the state. 1 *Rev. Laws*, 70; *De Peyster v. Michael*, 6 N. Y. 467, 503. And, finally, the Revised Statutes, which went into operation Jan. 1, 1830, took away the position of the state as lord paramount, abolished all manorial rights as such, swept away *all* feudal tenures, and made every piece of land within the state alodial, "so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates." *Rev. Stat. Part II. ch. i. tit. 1, § 3*; *N. Y. Const. 1846, Art. I. § 13*; *N. Y. Const. 1894, Art. I. § 2*. In summary, there was never any time in the history of New York when conveyances between individuals could create a tenure, except in this special case of grants, from the crown, of power to erect and maintain manors. As to such manor lands, the crown was superseded by the state on the ninth day of July, 1776, the intermediate lords as such disappeared on the twentieth day of February, 1787, and the state ceased to be the lord, and the lands that had been manorial and feudal became alodial on the first day of January, 1830.

The grants in fee of these manor lands, by the patroons to their tenants, were ordinarily made on two kinds of conditions, namely, (1) restraints on alienation, which provided that the tenants should not sell their lands without paying a fine, or a certain portion of the price, as one-quarter, one-tenth, etc., to the patroons, which latter were called quarter-sales, tenth-sales, etc., and (2) the reservation of perpetual rents, payable in money or in kind. For breach of either of these, the patroon, as grantor, or feoffor, usually reserved the right to re-enter and enforce a forfeiture. The first

¹ *Va. Stat. 1779, ch. 13.*

² *Conn. Stat. Oct. 1793, Stat. 1821, tit. 56, ch. 1, § 1, note.*

§ 290. **The State's Rights.**—The word "alodial" means free from tenure; but it does not imply exemption from govern-

class, "(1)," of these forms of restrictions has been repeatedly held to have been invalid. And the constitutions of the state have explicitly declared that, "All fines, quarter-sales, or other like restraints upon alienation, reserved in any grant of land hereafter to be made, shall be void." Const. 1846, Art. I. § 15; Const. 1894, Art. I. § 14; *De Peyster v. Michael*, 6 N. Y. 467, 504. But the second class, "(2)," of conditions—the reservation of rents and services certain—was excepted from the operation of the statutes which destroyed the feudal tenures of the lands (being vested property interests, they must be so excepted under the United States Constitution), and such perpetual rents and conditions, giving rights of re-entry and forfeiture for their non-payment, may still be legally created as to all lands which are not agricultural in character. They could also be legally made as to agricultural lands until 1846, when the constitution of that year provided that, "No lease or grant of agricultural land, for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid." Const. 1846, Art. I. § 14; Const. 1894, Art. I. § 13. A brief statement is here required, as to the nature of those perpetual rents.

Such of the rents as were reserved by the crown in granting the manors to the patroons were rents-service. The king, becoming as he did the feudal lord, retained the possibility of re-acquiring the lands, if any of the conditions upon which they were granted were broken (this reversionary right in him being called technically a *possibility of reverter*), and the rents reserved by him became incident to this reversionary interest, and were therefore rents-service. See § 102, *supra*. The rights to distrain and to re-enter and take back the property for non-payment, being both implied as incidents to rent-service, passed with these rents to the people of the state, when they acquired the rights and property of the crown on the ninth day of July, 1776. And, for default of payment, and by virtue of the rights so implied and acquired, some of the manor lands were subsequently taken away from their owners and disposed of by the state. Laws, 1819, ch. 222; Laws, 1824, ch. 225; Laws, 1825, ch. 251; *De Lancey v. Piegras*, 138 N. Y. 26, 38-43.

The rents which the patroons reserved, in granting lands in fee to their tenants, were, theoretically at least, of the same character as those reserved by the king—rent-service—if they were created before Feb. 20, 1787, i. e., before the time when the patroons could no longer subinfeudate or stand as *mesne* feudal lords to their tenants. The statute of that date made it impossible for one citizen or subject to reserve for himself any reversionary interest whatever when he conveyed real property in fee simple to another, and, therefore, upon such a conveyance, no rent-service could be reserved. But the rents and services certain, then in existence and owned by the patroons, and those which were subsequently created in conveyances of realty in fee were all recognized and preserved as charges upon the lands, and as practically *rents-charge* they have been sustained and made collectible and enforceable according to the terms of the covenants by which they were created. In a mere rent-charge, as distinguished from a rent-service, no right of distress, or of re-entry, is ever implied by

mental rights and control. Every man holds his real property, however absolute his interest therein, subject to the state's

the law. But, in all cases of the perpetual rents which were created by the patroons, and which have come before the courts, these rights were reserved by express covenants and conditions, if the rents should not be duly paid, or the services duly rendered. And, after some vacillation, the courts decided that such express stipulations were enforceable against the delinquent landowners by the patroons or *by their heirs or assigns*.

There has been much discussion and difference of opinion as to whether the assignees of these rents — the devisees, purchases, etc., of the original owners — could enforce these covenants and conditions, especially the condition for re-entry upon the land in case the rents were not paid. The difficulty grew out of the ordinary common-law rule that a condition annexed to a conveyance in fee can not be enforced, nor can re-entry be made for its breach, by any one but the grantor or his heirs. *Upington v. Corrigan*, 151 N. Y. 143. It was also strenuously contended that, even as covenants, stipulations for paying such rents, for distress, etc., could not run with the land or the rent, nor be available to the assignees of either, or enforceable by them. But it has been definitely and wisely decided that such rents, charged upon the land, are incorporeal hereditaments, issuing out of and binding the land, and that, without the aid of any statute, the covenants and conditions affecting them run in both directions, — with the rent in the hands of the assignee, so as to enable him to sue on and enforce the covenants and conditions, and with the land itself in the hands of its purchaser, so as to render him liable to have them enforced against him. *Van Rensselaer v. Hays*, 19 N. Y. 68, 86; *Van Rensselaer v. Read*, 26 N. Y. 558, 570; *Cruger v. McLaury*, 41 N. Y. 219; *Upington v. Corrigan*, 151 N. Y. 143, 150. All remedy by distress was abolished for the future by statute enacted May 13, 1846 (L. 1846, ch. 274); but the other remedies reserved by the terms of the grant of the rent still remain for the grantee and his heirs and assigns. This statute practically changed these perpetual rents into rents-*seck*.

These results have been arrived at chiefly as common-law principles affecting the perpetual rents reserved in New York upon grants (or so-called *leases*) of lands in fee. Statutes have also had much to do with them. And, although it is now settled that legislation was not required for the benefit of the assignees of such rents, yet much law has clustered around these statutes, and they should be briefly examined. In 1774 (L. 1774, ch. 14), the colonial legislature passed an act making these rents, arrears of which had not been paid for three years within the twenty years preceding, collectible as were rents reserved on leases for years. This act was a repetition of the English statute 4 Geo. II. ch. 28. By statute, ch. 7, Law of 1788, entitled, "An act to enable grantees of reversions to take advantage of conditions to be performed by lessees," which statute followed the terms of that of 32 Hen. VIII. ch. 34, it was provided that the grantees and assignees of either the lease or the reversion, when the lease was less than in fee, should have the same remedies, by entry, action, distress, or otherwise, as their grantors or lessors had or might have had. And, by ch. 98, Laws of 1805 (April 9, 1805), these provisions were extended as well to grants or leases in fee, reserving rent, as to leases for life or for years.

right of *eminent domain*, and to the right of the government to regulate the use of it by such rules and limitations as the public

This law of 1805 was repealed by Act of April 14, 1860 (L. 1860, ch. 396), as to all conveyances or leases in fee made before April 9, 1805, or after April 14, 1860; but, since the rights of the assignee of a rent-charge did not really depend on that statute (though some early decisions rested upon it, i. e., *Van Rensselaer v. Ball*, 19 N. Y. 100, and see *Van Rensselaer v. Hays*, 19 N. Y. 68; *Cornell v. Lamb*, 2 Cow. 652), but on the common law, the repeal of the statute did not affect those rights. And, even if it could have done so, they have been held to be preserved by section 3 of chapter 274, Laws of 1846, which expressly recognizes the assignees' interests in connection with such leases and rents. All of this legislation, affecting assignees of rents and of the lands out of which the rents accrue, is now summarized in § 193 of the New York real property law (ch. 547, L. 1896), which is as follows: "The grantee of leased real property, or of a reversion thereof, or of any rent, the devisee or assignee of the lessor of such a lease, or the heir or personal representative of either of them, has the same remedies, by entry, action, or otherwise, for the non-performance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture, as his grantor or lessor had, or would have had, if the reversion had remained in him. A lessee of real property, his assignee or personal representative, has the same remedy against the lessor, his grantee or assignee, or the representative of either, for the breach of an agreement contained in the lease, that the lessee might have had against his immediate lessor, except a covenant against encumbrances or relating to the title or possession of the premises leased. *This section applies as well to a grant or a lease in fee, reserving rent, as to a lease for life or for years; but not to a deed of conveyance in fee, made before the ninth day of April, eighteen hundred and five, or after the fourteenth day of April, eighteen hundred and sixty.*" Since, as was above explained, it has been held that without the aid of this statute the assignees of both parties to perpetual rents have all the rights and remedies of their assignors, the sentence of the statute which is here printed in italics was not required, and has in fact no operation; and the last clause of that sentence does not interfere in any way with the remedies for the non-performance of the covenants or conditions affecting such rents.

The remedies incident to such rents as these, including the recovery of their fruits or proceeds, are fully discussed in §§ 104, 114, *supra*, and the New York notes thereto. It simply needs to be added here that §§ 2231-2265, N. Y. Code Civ. Pro., which provide summary proceedings for the removal of tenants for years, tenants at will, etc., for non-payment of rent, do not affect these perpetual rents, nor afford any remedy because of non-performance of their accompanying conditions or covenants.

The general results, as to these perpetual rents, may be summarized as follows: As reserved in conveyances of the manor lands, they were valid as rents-service before Feb. 20, 1787, and after that date and until 1816 as rents-charge; the statute of 1846 (ch. 274), which removed the right to distrain for their proceeds, changed them into rents-seck; they may still be reserved as rents-seck in conveyances in fee of land which is not

good may require; and, if the owner of an inheritable interest die without heirs and without disposing of it, it passes by *escheat* to the state. Escheat here, however, has no feudal character, but is a right established in modern jurisprudence, which is similar to the feudal principle of the same name. Each state, *by virtue of its sovereignty*, is deemed to have the original and ultimate property in all the lands within its jurisdiction.¹ (a) So the duty of allegiance to the state, which in feudal times was often confused with fealty, is obligatory upon every citizen; but this has now no necessary connection with the ownership of land.²

§ 291. **The Statute of Quia Emptores.**— While feudal tenures continued to exist in this country, the Statute of *Quia Emptores*, which forbade subinfeudation by any but the king's

agricultural; they may be enforced and dealt with by and against the heirs and assignees of the original parties to the contracts or conventions by which they were created; the remedies available to such parties and their heirs and assignees are fully regulated by statutes, which change and ameliorate the common-law rules relating to rent.

The study of the decisions upon the manor lands of New York, and the rents and services associated with them, throws much light on the feudal system, especially in its operation upon the law of real property in this country. Some of such decisions are: *People v. Van Rensselaer*, 9 N. Y. 291; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Ball*, 19 N. Y. 100; *De Peyster v. Michael*, 6 N. Y. 467; *Van Rensselaer v. Dennison*, 35 N. Y. 393; *Van Rensselaer v. Jewett*, 2 N. Y. 135, 141; *Van Rensselaer v. Read*, 26 N. Y. 558; *Van Rensselaer v. Slingerland*, 26 N. Y. 580; *Van Rensselaer v. Snyder*, 13 N. Y. 299; *Van Rensselaer v. Barringer*, 39 N. Y. 9; *Hosford v. Ballard*, 39 N. Y. 147; *Cruger v. McLaury*, 41 N. Y. 219; *Plumb v. Tubbs*, 41 N. Y. 442; *De Lancey v. Piepgas*, 138 N. Y. 26; *Upington v. Corrigan*, 151 N. Y. 143; *Livingston v. Miller*, 11 N. Y. 80; *Cornell v. Lamb*, 2 Cow. 652; *Van Rensselaer v. Jones*, 5 Denio, 449; *Van Rensselaer's Executors v. Gallup*, 5 Denio, 454; *Van Rensselaer v. Bouton*, 3 Keyes, 260; *Van Rensselaer v. Jones*, 2 Barb. 643; *Tyler v. Heidorn*, 46 Barb. 439, 48 N. Y. 671; *Cagger v. Lansing*, 4 Hun, 812, 64 N. Y. 417; *Main v. Davis*, 32 Barb. 461; *Van Rensselaer v. Bonesteel*, 24 Barb. 365.

(a) The New York Constitution, Art. I. § 10 (Const. of 1894), declares that, "The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all the land within the jurisdiction of the state; and all lands, the title to which shall fail from a defect of heirs, shall revert or escheat to the people." In the former constitutions this was Art. I. § 11.

¹ 3 Kent's Com. pp. *512-*514; 1150; Chase's Blackst. pp. 286, 287, 1 Stim. Amer. Stat. L. §§ 400, 401, note.

² 2 Kent's Com. pp. *44-*50.

tenants in chief with his permission, was in operation in all the states except South Carolina and probably Pennsylvania.¹ The abolition of feudal tenures, of course, made feudal subinfeudation an impossibility. And hence it has been cogently argued that it is idle to assert that that famous statute still operates in any state but the three in which the theory of feudalism is retained.² So far as the mere letter of the statute and its direct destruction of subinfeudation are concerned, this is unquestionably correct. But, in allowing "every freeman to sell at his own pleasure his lands and tenements, or part of them," the statute, by necessary implication, removed practically all power from a grantor of an estate in fee simple to restrain the right of alienation by his grantee. "The grantor's right to restrain alienation immediately ceased, when the statute put an end to the feudal relation between him and his grantee; and no instance of the exercise of that right, in England, since the statute was passed, has been shown, or can be found, except in the case of the king, whose tenure was not affected by the statute, and to whom, therefore, it did not apply."³ That landmark of legislation, therefore, must be understood to have put two leading negative principles into the law of real property, namely, (a) the forbidding of subinfeudation by any but the king's tenants, and (b) the prohibition of restraints upon alienation in conveyances in fee simple. While the former of these necessarily disappeared with feudal tenures, the latter has remained operative as a powerful factor in the development of American jurisprudence. In some of the states, it has been put into modern statutory form.⁴ (a)

In a word, then, in all of the states of this country except Pennsylvania and South Carolina, the Statute of *Quia Emptores* has always been in force, restraining subinfeudation while feudalism continued, and continually maintaining freedom of alienation of estates in fee simple. But it is to be carefully noted here, that it does not affect in this manner any convey-

(a) The Statute of *Quia Emptores* has always operated as a principle in New York, and is still a part of its law. Const. 1894, Art. I. § 14; Van Rensselaer v. Hays, 19 N. Y. 68; De Lancey v. Piepgas, 138 N. Y. 26, 39; note on Manor Lands of New York, p. 389, note a, *supra*.

¹ Gray, Perpetuities, §§ 26-28.

⁴ N. Y. Const. (1894) Art. I. § 14;

² Gray, Perpetuities, §§ 24, 25.

¹ N. J. Gen. Stat. (1895) p. 879; Gray

^{*} De Peyster v. Michael, 6 N. Y. 467. Perpetuities, §§ 20-28.

ances but those in fee simple. He who owns an interest in realty, and carves out of it and conveys away a lesser estate than his own, as one for life or for years, has a reversion left in himself, and, as the owner of such reversion, may curtail or preclude the right of the alienee to dispose of the interest thus conveyed to him.¹

¹ The Statute of *Quia Emptores* itself says: "And it is, to wit, that this statute extendeth but only to lands holden in fee simple, and that it extendeth to the

time coming." Digby, Hist. Law R. P. (5th ed.) p. 238; *De Lancey v. Piepgras*, 138 N. Y. 26; *Upington v. Corrigan*, 151 N. Y. 143.

BOOK III.

ESTATES IN REAL PROPERTY.

Treated in

PART I.—AS TO COURTS.

PART II.—AS TO QUANTITY.

PART III.—AS TO NUMBER AND CONNECTION OF OWNERS.

PART IV.—AS TO QUALIFIED OR UNQUALIFIED NATURE.

PART V.—AS TO TIME FOR ENJOYMENT TO BEGIN.

CHAPTER XVIII.

ESTATES. — EXPLAINED AND CLASSIFIED.

§ 292. Estates defined and illustrated.

§ 293. Classification of estates.

§ 292. **Estates defined and illustrated.** — The interest that one has in lands, tenements, or hereditaments is his *estate* therein. If we use the word “property” here to denote the object of ownership, — the piece of corporeal or incorporeal realty, — the interests which one has in it is his estate, his *status*, condition or circumstances in which he stands with regard to that property.¹ The acre of land, the house and lot, the right of way, or the ferry right is the ultimate real thing, which may be the object of various different interests and ownerships; and in this one thing one man may have an estate for a term of years, another for life, and another in fee simple. It may be owned by a number of people, as joint tenants or tenants in common; one person may have the right to present enjoyment of it, while the interest of another is such that he must wait for his enjoyment of it till some time in the future; the estate of this owner may be certain and absolute, while

¹ The development of “estates” is explained in Maine’s *Anct. L.* ch. viii. In West’s *Symboliography*, § 31, it is said: “An estate, *status*, *dominium*, *proprietas*, is that right and power whereby we have the property or possession of things, that is, whereby we be owners or possessors thereof.” The right of one who held land for a term of years gradually strengthened, in the common law, from a mere possession, which the landowner might legally terminate at any moment, to a fixed interest, which the termor could retain for the period designated in the lease, even against the will of the landlord. When the tenant had attained to this last position

with regard to the land, and so had acquired the power, which is still his, of regaining the possession of the specific land leased if he were evicted during the term, he was then, for the first time, said to have an *estate* for years in the land. He had become the owner of something more than a mere contractual right. He had become the owner of an interest in the land itself, a *dominium*, a *proprietas*, which the law recognizes as such and enables him to retain. The study of this matter may aid the student in acquiring a precise idea of this term “estate.” See Digby, *Hist. Law R. P.* (5th ed.) pp. 176–181.

that of the other is conditional or defeasible; one man may have in it an interest which is recognized and protected by a court of law, and the right or estate of another may be such that no cognizance or enforcement of it can be had save in a court of equity. These various interests or *estates* in the property are at once seen to be different from the *holdings* of it, and from the *titles* to it, or the modes by which it may be acquired. A man may be known as owning a certain farm for life, or for himself and his heirs, without regard to how he obtained it, the validity of his title, or whether his holding is alodial or by tenure under a superior lord. His *estate* in the land is a distinct thing, with which the law deals as such. And it is around estates that the greatest part of the law of real property has clustered.¹

The existence of estates in real property is the most important distinguishing feature between it and personalty. While there may be created several separate and distinct interests in one chattel, whether personal or real, this is not commonly done, because the article is only temporary and in a short time will cease to exist. The owner of it is ordinarily thought of and treated as owning absolutely the article, such as his watch, or horse, or plough, and not merely as having an estate therein.² But the law contemplates a parcel of land, or usually a rent-charge issuing out of it, as something which will continue in existence forever, and therefore recognizes the probability as well as the possibility of many and

¹ Originally, and probably as late as the middle of the thirteenth century, the word "estate" was used in England to describe the personal condition of the feudal tenant—his *status*. But, under the feudal system, this personal position was so closely connected with his proprietary rights that the transition to the use of the word to denote his interest in real property was natural and easy. 2 Poll. & Mait. Hist. Eng. Law (2d ed.), pp. 10–13; 2 Blackst. Com. p. *163. The same word is often popularly employed to denote generally the property which one owns. Thus, a deceased person is said to have left a "large estate," or a "complicated estate;" and executors, administrators, and trustees are said to manage or settle the "estates" entrusted to them. But, in dealing with the law of real property, these meanings

of the word must be disregarded, in most instances, and its meaning must be confined to the interest which one has in lands, tenements, or hereditaments.

² Distinct and separate interests in a personal chattel are sometimes created by a bailment of it; and, by means of subleases, the ownership of chattels real is frequently divided into different parts for different owners. There is no legal prohibition against the creation of many different estates in the same chattel of any kind. 1 Leake, 4; Gray, Perpetuities, §§ 71–97. But the important fact for the lawyer is that, because of the temporary character of personal property, this is not done to any large extent, and rarely causes any of the complicated questions which arise from the existence of numerous estates in real property.

varied estates connected with it and belonging to different owners. The subtle reasoning of feudal and scholastic ages, in dealing with these possibilities, brought into the law of real property many niceties and technical refinements which have never had any material influence upon personalty. The fine distinctions and technical results, however, which are involved in the present law of real property, are always logical; and, as a result of modern statutes, most of them which remain are of practical importance and utility.

§ 293. **Classifications of Estates.**—The vast influence of courts of equity in the moulding of English jurisprudence is most conspicuously manifested in the new species of interests in real property which they have created and preserved. By the operation of the maxim, "Equity follows the law," these new and important interests have generally been made subject to the same incidents and principles that govern the older estates of purely common-law cognizance. It is because those incidents and principles can be most satisfactorily studied as now generally applicable to all estates alike, whether legal or equitable, and because in dealing with the other classifications of estates the equitable interests must be frequently referred to, that it has been decided to depart, in this treatise, from the time-honored custom of discussing estates first with reference to their quantity.¹ Therefore they will be examined in *Part I.*, of this book as divided, with regard to the courts in which they are dealt with, into 1. legal estates and 2. equitable estates. The second basis of classification (*Part II.*) will be with reference to their quantity, or the extent of their owners' interest; the third (*Part III.*), with regard to the number and connection of their owners; the fourth (*Part IV.*), with regard to their qualified or unqualified nature, and the fifth (*Part V.*), with regard to the time when their owners may begin to occupy and enjoy the property or object of ownership. It is believed that this order of discussion will both conduce to clearness and avoid the necessity for repetition to any material extent.

¹ The suggestion is also ventured that, of all the different interests in lands, tenements, and hereditaments, equitable estates, so called, come the nearest to being a distinct species of property, — the nearest to being in and of themselves objects of ownership, as distinguished from the ownership itself.

They can be intelligibly studied alone, without regard to the other forms or classes of estates, the same as can a rent, a franchise, or an easement in gross; and a thorough knowledge of them is of great assistance to the understanding of the other interests in real property.

PART I.

1. LEGAL ESTATES.

2. EQUITABLE ESTATES.

2. EQUITABLE ESTATES.

CHAPTER XIX.

(1) USES.

§ 294. Legal estates distinguished from equitable estates.

§ 295. Prototypes of the use.

§ 296. Growth of the use in the common law.

§ 297. Development of the use into an equitable estate.

§ 298. Early distinctions between a use and a trust.

§ 299. Definition of use and trust.

§ 300. The requisites of a use.

§ 301. Characteristics of the use before the Statute of Uses.

§ 302. The Statute of Uses.

§ 303. How the Statute of Uses was interpreted and construed.

§ 304. How the use was retained under the name of a trust.

§ 294. **Legal Estates distinguished from Equitable Estates.** — The earliest cognizance and control of estates in lands, tenements and hereditaments were, of course, in the courts of common law. Those courts first dealt with interests in realty in a plain, direct manner, suited to the simplicity of the times. And the legal estates, which they knew and protected, are, in the main, the strictly legal estates which are recognized by the courts of law of to-day. They were and are the ordinary, well-known interests in realty, for which the owners have, by and for themselves and without looking to any trustees or other holders for them, their remedies at law for any wrongful taking of or injury to the lands, tenements, or hereditaments. At first such estates answered all the requirements of business and commerce. Before the reign of Edward III., and possibly down to a somewhat later date, they were the only forms

of *estates* in realty, which had been known to any system of law.¹

But the rigidity of procedure of the common-law courts, their strict and inflexible adherence to precedents, the stringency of feudal exactions and the restraining force of a number of acts of parliament gradually impeded the full enjoyment of these legal estates, especially by restricting their alienability and thus impairing their utility as articles to be employed in the growing business of the realm. It was to get rid of these burdens, and in particular to enable the ecclesiastical corporations to evade the Statutes of Mortmain, which forbade them to take title to land, that the system of *uses* and *trusts* grew into prominence and became the most important forms of equitable estates.² And it was to mitigate the hardships, which the inelasticity of common-law procedure placed upon mortgagors of real property, that the so-called equity of redemption was invented and enforced for their benefit, by the Court of Chancery, and grew into the other important form of equitable estates. Each of these species of equitable estates will be separately considered. It will thus appear that the *equitable* estates are (1) *uses*, (2) *trusts*, and (3) *equities of redemption*, and that all other estates — the more ordinary ones, which have not been developed by a court of equity, — are *legal*.

§ 295. **Prototypes of the Use.** — The origin of the *use* in real property has been the subject of much historical research and many learned discussions. Probably it can not be distinctively traced to any one system of early jurisprudence, nor precisely assimilated to any law or custom of any people or peoples other than the Anglo-Saxon race. Rooted in practices which are common to all civilized communities, it grew up in England as a product peculiar to that island. Those practices are the natural and almost necessary employment of agents, confidants, or fiduciary persons of some kind, in holding and managing property. And that product is the vast system of uses and trusts which now involves so important a part of English and American law.

It is because every system of jurisprudence, as soon as it becomes at all complex, will employ agents, third parties and intermediaries of varying types and orders, that so many things

¹ 1 Leake, 7; Digby, Hist. Law R. P. (5th ed.) pp. 43, 60, 315-326.

² 2 Blackst. Com. pp. *268-*272;

Digby, Hist. Law R. P. (5th ed.) p. 316;
2 Poll & Mait. Hist. Eng. Law (2d ed.), pp. 228-239.

analogous to the English use are to be found in other bodies of law. A few of those things, which may have supplied suggestions for the originals of our uses and trusts may profitably be noted. One of them was the *usus* of the Roman law, from which it was long thought that the English use took its name. But it is now known that our word is derived from the Latin *opus*, which in old French is *os* or *oes*, and that the earliest transfers of this kind were to one person "*ad opus*" (to the use) of another.¹ The Roman *usus* was simply the right to the natural use of something, owned by another, which right belonged to some definite individual and his family and was as a rule not transferable. The owner held the article so that he who had the *usus* and his family personally might take only so much of the fruits or products as was necessary for their daily consumption. They had no title, either legal or equitable, but only this restricted privilege of enjoying the products of another's property.²

Another suggestion for the originators of the English use may have been found in the Roman idea of *usus-fructus*, which was a right broader than the mere *usus* in that it gave the right to the temporary enjoyment of a thing, without restricting the amount to daily needs, and could be sold or otherwise transferred to another. But the civil law never created any binding obligation in such a case, whereby the owner of the article could be compelled to hold it in trust for the benefit of the usufructuary; and so it did not produce the beneficial results which are caused by our uses and trusts. It made the relation between the parties more like that of a temporary owner—such for example as a life tenant—and the reversioner in fee.³

Probably the most pertinent suggestion and closest analogy furnished by the civil law were found in its *fidei-commissa*. In that law there were many restrictions on successions and legacies. For example, a testator could not will property to one who was not a Roman citizen; nor, after duly devising property to one person, could he ordinarily name another devisee to succeed the one first named; i. e., the first beneficiary must take the absolute legal and beneficial ownership of the property and the testator could control it no further. To avoid such difficul-

¹ 2 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 228.

² Just. Inst. Lib. ii. tit. iv and v.

³ Ibid.; Tompkins & Jenkyn's Modern Roman Law, 173, 174.

ties, there arose the practice, in the later period of the Republic, of a testator "instituting an heir" and at the same time directing him to dispose of all or some of the property in a particular manner. The trust or confidence thus reposed in the designated heir was called *fidei-commissum*.¹ For a long time there was no means of enforcing the performance of these commissions. In the early part of the reign of Augustus, however, that monarch directed the consuls to compel the carrying out of the otherwise imperfect duties thus imposed; and finally a prætor *fidei-commissarius* was appointed to take charge of such trusts and enforce the proper obligations which they had created.² But this system of controlling property by will never resulted, as did the English use, in the creation and control of an equitable estate separate and distinct from the legal title and ownership. It was simply a means of compelling the transfer of the only known estate — the legal one — to the person to whom it justly belonged.³ It was a successful device, however, for avoiding obstacles which the *jus civile* had interposed; and as such it probably afforded an important hint to those who were called upon to surmount the difficulties whereby the common law and statutes impeded certain transfers of lands, tenements and hereditaments.⁴

It is to be added that, in regard to their *res mancipi*, the Romans, before the time of Justinian, made a distinction between legal and beneficial ownership. If such an article were sold, but the ceremony called *mancipatio* did not accompany the transfer, the purchaser obtained only the beneficial interest in it, while the legal title remained in the vendor.⁵ This distinction never affected any interest in land, and it was abolished by Justinian;⁶ but it may have been one of the analogies upon which our uses and trusts depend.

By a method similar to the Roman *fidei-commissum*, the

¹ Just. Inst. Lib. ii. tit. xxiii.

² Gaius, Lib. ii. § 278; Just. Inst. Lib. ii. tit. xxiii. §§ 1, 2.

³ The distinctions between the *fidei-commissa* of the civil law and the uses and trusts of the common law are clearly pointed out in *McDonough's Executors v. Murdoch*, 15 How. (U. S.) 367, 407-409.

⁴ Amos on the Science of Jurisprudence, 91. The form of our trusts, which has the closest resemblance to the *fidei commissa* is the giving of prop-

erty to one person in trust to convey or transfer to another. "There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law." *McKee v. Lamon*, 159 U. S. 317, 322.

⁵ Gaius, ii. 40.

⁶ Cod. Lib. vii. tit. 25, *De nudo jure quiritium tollendo*; Digby, Hist. Law R. P. (5th ed.) pp. 316, 317.

Franks of the *lex salica*, who were "one family of our legal ancestors," employed temporary trustees for the purpose of passing property to heirs who could not otherwise be appointed or adopted. The third party, to whom the title was thus passed, was called the "saleman;" and it was his duty, though probably as an imperfect and unenforceable obligation, to hand it over to the purchaser or other rightful owner.¹ But here again there is no evidence of any separation of the title or estate into two distinct parts, the one legal and the other equitable. There was only a means of compelling one holder of property to transfer its title to another person.

In all of these schemes and arrangements, and in all others in which historians have sought for the prototype of the English use, one or both of two characteristics of the latter in its final stage of development are lacking. Those characteristics are (a) that the owner of the use has an *estate*, an interest in the realty held for him, which is something more than a mere right against the person of the holder of the legal title, and which a court of equity will recognize and protect as a distinct and separate ownership; and (b) that he has a complete and adequate means of compelling the exact fulfillment of all the duties and obligations which are imposed upon the holder of the legal title because of the existence of this equitable estate. If these two elements have ever co-existed in any species of real estate other than the English use and trust, it has been for so short a time or in so unimportant a manner that history has lost sight of the fact. It is safe to conclude that uses and trusts, as we know them, are, in the main, original productions of the equity side of our common law. How they were created and developed is next to be examined.

§ 296. **Growth of the Use in the Common Law.** — "A slight but unbroken thread of cases," say Pollock & Maitland,² "beginning while the conquest is yet recent, shows us that a man will from time to time convey his land to another 'to the use' of a third. For example, he is going on a crusade and wishes that his land shall be held to the use of his children, or he wishes that his wife or his sister shall enjoy the land, but doubts, it may be, whether a woman can hold a military fee, or whether a husband can enfeoff his wife." And they proceed

¹ *Lex Salica*, tit. 46, *De adfathamire*; & Mait. Hist. Eng. Law (2d ed.), p. Heusler, *Institutionem*, i. 215; 2 Poll. 230.

² 2 Hist. Eng. Law (2d ed.), p. 231.

to show how, to such private arrangements, were soon added cases in which lands were given to convents or other religious houses, for special purposes or uses, as “‘to the use’ of the library or ‘to the use’ of the infirmary;” and how, after the coming to England, in the early part of the thirteenth century, of the Franciscan friars, who could own nothing, much land, as well as other property, was conveyed to the borough communities for the use of the friars. And they add: “It is an old doctrine that the inventors of ‘the use’ were ‘the clergy’ or ‘the monks.’ We should be nearer the truth if we said that to all seeming the first persons who in England employed ‘the use’ on a large scale, were not the clergy, nor the monks, but the friars of St. Francis.”

Thus the employment of an intermediary, to hold the legal title to realty for one who could not personally take and hold it as was desired, came gradually into our law as the requirements for it arose. And when the statutes of *mortmain*, first as chapter 36 of *Magna Charta* (1217), and afterwards as the statute *de religiosis*, 7 Edw. I. (1279), and the statute 13 Edw. I. ch. 32 (1285),¹ had practically prohibited the taking of real property by the great religious houses, the lawyers who were employed by those institutions resorted naturally to this means of serving their clients, and had property conveyed to individuals “for the use” of the ecclesiastical institutions. The religious bodies were thus enabled practically to evade the statutes, and to obtain all the enjoyment of and benefits from the land of which they could not take the legal title.² Although the statute 15 Rich. II. ch. 5, which required all lands held “to the use of religious people or other spiritual persons” to be *amortized* by license from the king or to be disposed of for some other use, practically deprived the ecclesiastical houses of the benefit of this invention; yet their dealings with it naturally led to its employment for many other purposes. Especially during the civil wars between the house of York and that of Lancaster, when the triumph of the wearers of the red rose was followed by attainder of the persons and confiscation of the estates of those who wore the white, and *vice versa*, the use, which was not forfeitable because of treason, became the most common form of property owned by the combatants, while the legal titles to their lands were carefully vested in

¹ See also stat. 34 Edw. I. ch. 3;
² Blackst. Com. pp. *268-*273.

² 2 Blackst. Com. pp. *271-*272;
¹ Spence's Eq. Jur. 440.

other persons.¹ And, after those wars were over, the use remained and continued to spread, as a favorite species of property, to avoid curtesy or dower, to evade creditors, to impair the remedies of the lord of the fee, etc., until the legal titles to and estates in practically all the real property in England were in one set of persons, while the uses or rights to the beneficial enjoyment of the same were in other individuals or institutions.² Since it had such an origin, and since it was carefully fostered and preserved by the Court of Equity alone — the court of the chancellor who was the “keeper of the king’s conscience” — it has been well said that the parents of the use “were *fraud and fear*, and a court of conscience was the *nurse*.”³

§ 297. **Development of the Use into an Equitable Estate.** — When the use is first noticed in legal records, it appears as a mere *personal confidence* in the one who holds the legal estate and who is called the *feoffee to use*. The beneficiary, the person for whom the property is held and who is called the *cestui que use*, has no legal means of compelling him to carry out the merely conscientious obligation. If, therefore, A were enfeoffed of land, *to the use of B*, or in trust or confidence that B might occupy the property and receive the fruits and profits, no court of that time would prevent A from ignoring B’s rights and appropriating all the land and its products to his own use and enjoyment. Without doubt, such obligations were special favorites of the Church, and were frequently enforced by the authority of the Confessor; but the *cestui que use* was without remedy in any other tribunal.⁴

There was an ancient practice in England for persons aggrieved, when the wrongdoers were too powerful for them, or the common-law courts afforded them no redress or no adequate remedy, to appeal directly to the council or the king for relief.⁵ In the twenty-second year of Edward III., it was ordered that all such applications, which were of grace, should be made directly to the chancellor, or to the keeper of the

¹ 1 Spence’s Eq. Jur. 441.

² Sand. Uses, 17; Burgess v. Wheate, 1 Wm. Blackst. 123, 135.

³ Atty.-Gen. v. Sands, Hard. 488, 491; Chudleigh’s Case, 1 Rep. 114, 123; Bacon, Readings upon Statute of Uses, vol. xiv. pp. 301, 302 (Boston ed. 1861).

⁴ “It is true that the ecclesiastical

courts at one time enforced conscientious obligations, entertaining suits *de fidei lesione*, but this jurisdiction is said to have been taken away from them in cases arising between laymen as to civil matters in the reign of Henry III.” Digby, Hist. Law R. P. (5th ed.) p. 315.

⁵ 1 Spence’s Eq. Jur. p. 335.

privity seal.¹ From the practice of receiving such petitions and making decrees upon them came the judicial functions of the chancellor, who theretofore had been only an exalted ministerial officer; and thus arose and grew the Court of Chancery, or Equity.² Unhampered by the precedents and technicalities of the older tribunals, this court had power to compel the specific performance of a purely conscientious duty; and it found the use ready for the exercise of that power. During the reign of Richard II., and “at some date later than 1393,” it began to take cognizance of these interests in realty;³ and, bringing the feoffees to uses before the court by means of its writ of *subpœna*, it compelled them to carry out the obligations resting upon their consciences, as by allowing the beneficiaries to hold and enjoy the land, conveying it to them, or doing or permitting such other acts as were expressly or impliedly required by the terms of the creation of the uses.⁴ But when the court of equity thus came forward, as the tribunal in which the *cestui que use* could find redress, it at first refused to issue its *subpœna*, in such a case, against any one but the feoffee to uses personally.⁵ And, while it would intervene to prevent *him* from wrongfully selling the property, or otherwise disposing of it to the injury of the beneficiary, yet, if before such interposition of the court he sold the land, or gave it away, or it descended to his heir, the *cestui que use*, during this period in the development of his interest, could not follow the realty; nor could he enforce his rights in any way against the third party into whose hands the legal estate had thus passed.

The last step in the advancement of the use to an equitable estate was the enlarging of the operation of the *subpœna*, in such cases, so as to reach and control the heir or purchaser of the feoffee to uses and, generally, to compel the observance of the rights of the *cestui que use* and the performance of the obligations in conscience owed to him by the heir, donee, or purchaser of the feoffee to uses, and by all other persons into whose hands the legal estate might come, except those who were disseissors or other adverse holders (i. e., not in privity with the feoffee to uses), or innocent purchasers of the land without

¹ Spence's Eq. Jur. p. 337.

² Select Cases in Chancery (Selden Soc.), pp. xvi. *et seq.*

³ Select Cases in Chancery (Selden Soc.), p. 48.

⁴ 1 Spence, Eq. Jur. pp. 338, 369; Digby, Hist. Law R. P. (5th ed.) p. 325.

⁵ Year Book, 8 Edw. IV. 6; Digby, Hist. Law R. P. (5th ed.) p. 326.

notice of the use.¹ This change probably occurred during the reign of Edward IV., or possibly a little earlier. And it was this addition to his remedies that first gave to *cestui que use* an *equitable estate* in the land — a *status* or position with reference to the land itself, as distinguished from a mere personal confidence in the feoffee to use — the power to follow the property itself along from hand to hand and to enforce his rights against its legal holder for the time being, unless or until it comes into the possession and ownership of one who is an adverse holder or has purchased it for value and without notice of the use. But it was then decided, and has ever since that time been held, that a purchaser of the legal estate, for a valuable consideration and without notice of the use, holds the land free from the obligation to the *cestui que use*.²

In summary, when uses first appeared in England the *cestui que use* had nothing but a personal confidence in the feoffee to uses; later he acquired the power by *subpœna* in equity to compel the feoffee personally while he kept the legal estate to live up to the requirements of that confidence; finally he became enabled to follow the land itself and to compel any one into whose hands it came to live up to the requirements of that confidence, unless or until the legal estate was acquired by one who held it adversely (not in privity with the feoffee to uses) or purchased it in good faith for value and without notice of the use. The courts have uniformly called his interest thus finally evolved an *equitable estate*.

§ 298. **Early Distinctions between a Use and a Trust.** — In the early times of which we have been speaking, there was a clear distinction recognized between a “*use*” and what was then designated a “*trust*.” Both of these grew up at about the same time into equitable estates.³ The foundation principle was the same in each; namely, that the legal title must be held by one person for the benefit of another who owned the equitable estate. When this holder of the legal title was nothing but a receptacle for it, and simply retained it generally

¹ Gould v. Petit, temp. Hen. VI. Chancery Calendar, ii. p. xxviii; Saundress v. Gaynesford, temp. Hen. VI. Chancery Calendar, ii. p. xxxviii.; Spence's Eq. Jur. pp. 445, et seq.; Bacon's Law Tracts, 318; Burgess v. Wheate, 1 Wm. Blackst. 123, 156.

² Year Book, 5 Edw. IV. 7 b; First

National Bank v. National Broadway Bank, 156 N. Y. 459, 468; Rochester & C. Turnpike Co. v. Parriour, 162 N. Y. 281; Otis v. Otis, 167 Mass. 245.

³ But strictly in point of time the special “*trust*” seems to have first appeared in English law. Sand. Uses, 7.

and permanently, so that the other might have all the control, management, and benefit of the property, the interest of the latter was called a *use*.¹ But when the recipient of the legal title had some special duty to perform, as for example to care for and manage the property and pay the net proceeds to the beneficiary, the interest of the latter was denominated a *trust*.² Thus the use was permanent and general, the trust temporary and special. Or, as Lord Bacon expressed it: "When a trust is not special nor transitory, but general and permanent, there it is a use."³ The use, as thus differentiated, was the most prevalent form of these interests, and the one most commonly spoken of and dealt with by the Court of Chancery before the enactment of the Statute of Uses in the twenty-seventh year of Henry VIII.⁴

§ 299. **Definition of Use and Trust.** — From the foregoing discussion it appears that a use or trust, as viewed from the standpoint of its owner — the owner of the equitable estate — is the right to the beneficial enjoyment of property of which the legal title and estate are in another person;⁵ and that, as regarded more especially from the standpoint of the holder of the legal title — the feoffee to uses or trustee — it is "an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence."⁶ Lord Coke defined it as, "a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which *cestui que trust* has no remedy but by subpoena in chancery."⁷

Bearing constantly in mind the fact that, as soon as the "remedy by subpoena in chancery" became available against all persons who took the legal title from, through, or under the original trustee or feoffee to uses with notice of the use or trust, or without paying a valuable consideration, the courts of

¹ Sand. Uses, 3; Bacon, Law Tracts, 305; Delamere's Case, Plowden, 346; Co. Lit. 272 b.

² Sand. Uses, 6; Cornish, Uses, 14; Tud. Lead. Cas. R. P. 255.

³ Bacon's Essay on Uses, 9; 1 Spence, Eq. Jur. 448; 1 Lewin on Trusts, p. *7; Hutchins v. Heywood, 50 N. H. 491, 497.

⁴ As to this statute and its operation and effects, see §§ 302-304, *infra*.

⁵ Bispham's Principles Eq. § 49; Warner v. McMullin, 131 Pa. St. 370, 381.

⁶ Stair's Institutions of the Laws of Scotland, B. iv. tit. vi. § 2, p. 591, § 3, pp. 592-594.

⁷ Co. Lit. 272 b. For other definitions of uses and trusts, and criticisms of the same, see 1 Perry on Trusts, §§ 1, 2; Underhill on Trusts and Trustees (Am. ed.), pp. 1-6.

equity called the interest of the beneficiary an *equitable estate*, and have continuously done so ever since, the elements of this famous definition formulated by Coke may be profitably examined, as revealing the essential characteristics of these forms of equitable interests. The expression, "a confidence *reposed in some other*," means, in the light of modern adjudications, that the holder of the legal estate and the beneficiary can not be *identical*. A may hold land for the use of B, or for the use of A and B; or A and B may hold it for the use of A or B. But if A undertake to hold it for the use of himself alone, the equitable estate is ordinarily merged in the legal.¹

The phrase, "*not issuing out of the land*, but as a thing collateral," distinguishes the use and trust from such interests as mortgages, judgments, terms of years and other liens, claims, and rights, which issue out of the land itself, and are binding in law upon every person into whose hands it may come.² This is further explained by the statement, "*annexed in privity to the estate in the land, and to the person touching the land*," i. e., to the person of the holder of the legal title because he is such holder. A mortgage, or other legal lien or claim, is attached to the land *per se*, regardless of who may be the owner. A use or trust is attached primarily to the *legal owner* of the land, and through him, collaterally, to the land.³ And, if the title leave him and pass to one who does not claim under him, or to one who purchases for value and without notice of the confidence, the use or trust is thereby destroyed.⁴ So, if the trustee be disseised, or if he be turned out of possession by a person having a paramount title, the disseisor or adverse holder is not bound by the trust or confidence because there is no

¹ Goodright v. Wells, Doug. 771; Selby v. Alston, 3 Ves. 339; Hamwood v. Oglander, 8 Ves. 106, 127; Wade v. Paget, 1 Bro. Ch. 363; Woodward v. James, 115 N. Y. 346; Carr v. Richardson, 156 Mass. 576; Greene v. Greene, 125 N. Y. 506; Merrill v. Hayden, 86 Me. 133. It has been held in some cases, and may safely be taken as generally accepted law, that where one of the beneficiaries is sole trustee — as where A is trustee for A and B, his own beneficial interest merges in his legal ownership. Bolles v. State Trust Co., 27 N. J. Eq. 308; Woodward v. James, 115 N. Y. 346, 357. It has been

said by the New York Court of Appeals that "the appointment of the beneficiary as trustee *by the court*, on the death or resignation of the testamentary trustee, does not extinguish the trust." Losey v. Stanley, 147 N. Y. 560, 568.

² Lewin on Trusts, p. *15.

³ Finch's Case, 4 Inst. 85; Gilbert on Uses, 429; Reeves v. Evans, 34 Atl. Rep. 477 (N. J. Eq.).

⁴ Finch's Case, 4 Inst. 85; Bassett v. Nosworthy, 2 Lead. Cas. Eq. 1; 1 Perry on Trusts, § 218, and cases cited; § 247, *supra*.

privity of estate between him and the ousted trustee.¹ In a word, the creation of a use or trust separates the title into two parts — legal and equitable — and gives to the owner of the equitable estate thus formed the right to enforce his claim against the trustee, or feoffee to uses, and against all persons into whose hands the legal estate may come, except adverse or paramount owners and innocent purchasers for value without notice of the use or trust.

The last clause of Lord Coke's definition — “for which *cestui que trust* has no remedy but by subpœna in chancery” — was, at the time when it was written, an accurate statement of the means by which the owner of the use or trust could enforce his rights and protect his interest, and it clearly expresses the reason for calling such an interest an equitable estate; but, as will be more fully explained hereafter, the result of statutes and of the tendency of all judicial tribunals to follow the correct lead of equity has been to give to other courts considerable cognizance of uses and trusts and important forms of remedies for the owners of these equitable estates.²

Having thus ascertained the nature of a use, as it arose and flourished in early English law, we have next to examine its requisites and chief characteristics, before it was affected by the Statute of Uses, 27 Hen. VIII. ch. 10, and the rules and constructions based on that famous enactment.

§ 300. **The Three Requisites of a Use.** — Three things were

¹ 1 Perry on Trusts, § 14; 1 Spence, Eq. Jur. 445. “All those persons who take under the trustee by operation of law are privies, both in estate and in person, to the trustee. Thus those who take as heirs under the trustee, or as tenants in dower or curtesy, or by extent of an execution, or by an assignment in insolvency or bankruptcy, are bound by the trust. It has been thought that a lord, who takes by an escheat, or by a title paramount, would not be bound by the trust; but the point has not been adjudged.” 1 Perry on Trusts, § 15, citing *Leake v. Leake*, 5 Ired. Eq. (N. C.) 361, 366; *Burgess v. Wheate*, 1 Eden, 177, 203. See also *Otis v. Otis*, 167 Mass. 245; 1 Lewin on Trusts, pp. *15, *16.

² The old court of chancery, as such, no longer exists in England, and

all branches of the High Court take cognizance of equitable rights and remedies. A similar result is produced in most of the states of this country by the amalgamation of the courts by the codes of procedure. But, in England, the Chancery Division is still the proper branch of the court in which to enforce express trusts; and all of the amalgamated courts in the United States have equity sides, or “terms,” to which the cognizance of uses and trusts more especially belongs. See “Supreme Court of Judicature Act,” 36 & 37 Vict. ch. 66; 44 & 45 Vict. ch. 68; N. Y. Code Civ. Pro. §§ 217, 484, 2988, 3339; *McCartney v. Bostwick*, 32 N. Y. 53, 57; *Kennedy v. Fury*, 1 Dall. (U. S.) 72; 1 Perry on Trusts, § 17.

necessary to the existence of a use, namely, (a) a subject-matter, or as it was frequently styled a *use*, in being, (b) a feoffee to uses in being, and (c) a *cestui que use* in being.

(a) Only real property, whether corporeal or incorporeal, which was *in esse* at the time and capable of having the seisin thereof, or what answered to the seisin, transferred at once to the feoffee to uses, could be the subject-matter held or conveyed to use.¹ Nothing could be so conveyed or held, whereof the use or enjoyment is inseparable from the possession, such as annuities, commons and ways in gross.² And, while one who was seised of land might grant it to another for the use of a third person for a term of years, yet he who had no interest for himself other than a leasehold for years, since he had no *seisin*, could not so deal with the property.³ But all realty, of which one could have the present seisin whether in possession, reversion, or remainder, and which was not property *quæ ipso usu consumantur*, could be made by him the subject-matter of a use.⁴

(b) All natural persons, who could be feoffees of land at common law, could be feoffees to uses. Even infants and married women, being capable of taking and holding the legal title to realty, were compellable by chancery to hold it as feoffees to the use of other persons.⁵ Corporations aggregate were declared to be incapable of holding such a position, because there were no means of compelling them to recognize the rights of the beneficiary;⁶ and the king was also beyond the reach of such obligations, for "the arms of equity are very short against the prerogative."⁷ But it is now uniformly held that any corporation may be seised to uses, provided that they and their objects are not foreign to the purposes of its own existence.⁸

(c) All persons, whether natural or artificial, who could

¹ Lord Willoughby's Case, W. Jo. 127.

² 2 Blackst. Com. p. *331; Beaudely v. Brooks, Cro. Jac. 189.

³ Lord Willoughby's Case, W. Jo. 127; Yelverton v. Yelverton, Cro. Eliz. 401.

⁴ Crabb, R. P. §§ 1610, 1611; 2 Blackst. Com. p. *331; 2 Wash. R. P. p. *98; Bispham's Prin. Eq. § 52.

⁵ Bac. Read. 58; Crabb, R. P. § 1607; Hill on Trustees, 48; Commrs v. Walker, 6 How. (Miss.) 143, 146.

⁶ Plowd. 102; Bacon on Uses, 57; Sugden, W. & P. p. 417.

⁷ Pawlett v. Atty.-Gen., Hard. 465, 467; Burgess v. Wheate, 1 Eden, 255; Briggs v. Light-Boats, 11 Allen (Mass.), 157.

⁸ Atty.-Gen. v. St. John's Hospital, 2 DeG. J. & Sm. 621; Trustees of Phillips Academy v. King, 12 Mass. 546; Matter of Howe, 1 Paige (N. Y.), 214; Jackson v. Hartwell, 8 Johns. (N. Y.) 422; Perry on Trusts, §§ 42, 43.

hold property at common law, could be *cestui que use*.¹ But an alien was uniformly forbidden to become *cestui que use* of property of which he was not capable of holding the legal title.² It frequently occurred that real property was conveyed to a feoffee "for the use" of one who was not in being or not yet ascertainable, as for the use of the oldest child of one who had no child, or to the use of the woman who might subsequently become the wife of a designated single man. In such a case, the feoffee took the legal title at once; but, since one of the requisites of a use was wanting, no use existed until the designated beneficiary was in being and definitely ascertained. When the *cestui que use* thus came *in esse*, the use sprang up in his or her favor.³

§ 301. **Characteristics of the Use before the Statute of Uses.** — In those early times the cognizance and control of uses was solely in the Court of Chancery (or Equity). In dealing with them, that tribunal in some respects followed the rules of law, in others departed widely from them. And it was because of the many instances in which it refused to apply those rules to the use that that equitable estate came to be a species of valuable interest, divested of most of the burdens and responsibilities which ordinarily accompany the ownership of property.

The maxim "Equity follows the law" was then not at all fully applied to these interests; and, when it was applied this was done chiefly in holding them subject to the same principles as legal estates in regard to their duration and devolution. Thus, they were descendible in the same manner as legal interests.⁴ And, if A were enfeoffed of a lot of land to the use of B and his heirs, B would thereby acquire an estate in fee simple in the use; if it were to the use of B while he lived, he would take a life estate, and so of an estate for years etc., the words denoting the extent or duration of the interest being given *prima facie* the same effect when applied to a use which they had at law when applied to the legal estate.⁵ It

¹ Sand. Uses, 370; 1 Lewin on Trusts, p. *43; 1 Perry on Trusts, § 60.

² Tud. Lead. Cas. R. P. 254; Du Hourmelin v. Sheldon, 1 Beav. 79; 1 Perry on Trusts, § 64. See Marx v. McGlynn, 88 N. Y. 357.

³ The "springing use," which thus

came into being, and the "shifting use," which was similar to it, are explained hereafter as forms of future estates.

⁴ 2 Blackst. Com. p. *330; 1 Spence, Eq. Jur. 454.

⁵ Sugden's Gilbert on Uses, ch. 1, § 2; Year Book, 5 Edw. IV. 7 b.

was not necessary, however, that any technical words of inheritance or limitation, such as "heirs," or "heirs of his body," should be employed to create estates of inheritance in a use,¹ although such words were required in a deed in order to create *legal* estates of inheritance. In dealing with the use, equity carried out the intention of the parties, when it was clearly expressed by any form of words which they chose to employ. And, while technical words would ordinarily be given their technical meaning, this would not be done if a different intent were clearly expressed by the parties to the transaction.² Equity also allowed uses to be disposed of by will,³ although the feudal principles at that time (and until the Statute of Wills, 32 Hen. VIII. ch. 1) forbade devises of the legal estates. Thus, if A held land to the use of B and his heirs, while the legal title could not be willed away, yet at B's death B might devise the use to C, and thereafter A would be compelled by the Court of Chancery to hold the land for the use of C or his grantees or devisees. It was by willing away uses in this manner that the prohibition imposed by the feudal system upon devises of real property was largely overcome.⁴ By act *inter vivos*, also, the *cestui que use* could freely sell or otherwise dispose of the use; and he might do this by deed, or writing not under seal, or mere oral instructions to the feoffee to uses.⁵ But, though often in possession of the land, the *cestui que use* could not alien the *legal* estate without the consent of the feoffee to uses, because he had no ownership thereof.⁶

In most other respects, the Court of Chancery departed

¹ 1 Cruise, Dig. tit. xi. ch. ii. §§ 26, 27; Tud. Lead. Cas. R. P. 253; 1 Spence, Eq. Jur. 452; Cornish, Uses, 19.

² 2 Blackst. Com. p. *331; 1 Cruise, Dig. tit. xi. ch. ii. §§ 20, 21.

³ Co. Lit. 271 b, Butler's note, 231; Crabb, R. P. § 1616.

⁴ Thus A, owning land of which he wished to dispose by will, would convey it to B to the use of A and to the use also of such persons as A might name in his will as *cestuis que use*. Then A would will away the use, and after A's death B would hold the legal title for the devisees. "Lord Bacon observes that one of the reasons why so much land was conveyed to uses was, because persons acquired by that means the

power of disposing of their property by will; which enabled them to make a much better provision for their families than they could otherwise have done."

⁵ 1 Cruise, Dig. tit. xi. ch. ii. § 36; Sir Edward Clere's Case, 6 Rep. 17 b; Tud. Lead. Cas. R. P. 268.

⁶ 1 Cruise, Dig. tit. xi. ch. ii. §§ 25-27; Crabb, R. P. § 1614; Cornish, Uses, 19; 1 Spence, Eq. Jur. 454. It was not until the enactment of the Statute of Frauds, 29 Car. II. ch. 3, that a writing was required by law, in disposing of a use or trust *inter vivos*. By § 7 of that chapter, all declarations of trusts or confidences in real property were required to be "*manifested and proved*" by some writing.

⁶ 2 Blackst. Com. p. *331.

from the rules of law in dealing with uses. The use, being a mere impalpable abstraction, could not be affected by the common-law property incidents which grew out of the doctrines of feudal seisin and tenure. Therefore a *cestui que use* could not be disseised or dispossessed of his use by an adverse claimant.¹ Therefore, also, there arose novel and important methods of creating and transferring uses, which will be explained hereafter.² So it was decided that there should be neither curtesy nor dower in a use.³ The lord was not entitled to an escheat on failure of heirs of the *cestui que use*;⁴ nor, except for certain changes introduced by legislation, was the king entitled to any forfeiture of the use for crime,⁵ or the creditor of its owner to reach it for the payment of his debt.⁶

Thus the use was divested of most of the plain and ordinary incidents of real property; and, while it was owned subject to the legal estate resting in the feoffee to uses and affected by legal incidents as against him,⁷ yet its owner could incur debts, commit crimes, secretly sell or encumber his property, or otherwise act in ways unfair or unjust towards others, without fear of any loss or diminution of his use, except by his own voluntary act or the crime, covin, or marriage of the feoffee to uses.⁸ Some of the results of this state of affairs, as expressed by Lord Bacon, were that "A man, that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship,

¹ 2 Wash. R. P. p. *106, par. 26.

² See Digby, Hist. Law R. P. (5th ed.) pp. 328-343.

³ "And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures." 2 Blackst. Com. *p. 331.

⁴ 2 Blackst. Com. p. *330; Sugden's Gilbert on Uses, ch. i, §§ 2, 5, 6.

⁵ This was remedied by early legislation, such as the statute 21, Rich. II. ch. 3, and the later statute 33 Hen. VIII. ch. 20, § 2, which made uses forfeitable upon attainder for treason. Cruise, Dig. tit. xi. ch. ii. § 31; 3 Inst. 19; Chudleigh's Case, 1 Rep. 114, 121; Tud.

Lead. Cas. R. P. 253; Jackson d. Gratz v. Catlin, 2 Johns. (N. Y.) 248, 261.

⁶ Cruise, Dig. tit. xi. ch. ii. § 35. "For, being merely a creature of equity, the common law, which looked no further than to the person actually seised of the land, could award no process against it." 2 Blackst. Com. p. *331.

⁷ The use, in this period before the Statute of Uses, was subject to the feudal duties and obligations of the feoffee to uses, to the dower of his wife (and to the curtesy of her husband if the feoffee were a married woman) and to the danger of being forfeited for his treason or felony. Sand. Uses, 67; 1 Spence, Eq. Jur. 445.

⁸ Ibid.

relief, heriot,¹ and escheat; the creditor of his extent for debt; and the poor tenant of his lease.”²

Through a series of years, many attempts were made to cure or prevent by statute these mischiefs and hardships. Instances of such attempts were the statutes 50 Edw. III. ch. 6, 1 Rich. II. ch. 9, and 19 Hen. VII. ch. 15, which aimed to enable creditors to take lands held to the use of their debtors; 4 Hen. VII. ch. 17, which sought to restore to the lord his wardships and reliefs in respect to realty held by one for the use of another; and 1 Rich. III. ch. 1, whereby the *cestui que use* was authorized to alien the legal estate in the land without the concurrence or consent of the feoffee to uses.³ But the subtlety of those who were endeavoring to perpetuate secret uses and their fruits was enabled to evade practically all of such enactments. The last one here mentioned — 1 Rich. III. ch. 1 — became of itself a fruitful source of perplexity and confusion. For it enabled the *cestui que use* to sell the legal estate, without depriving the feoffee to uses of the same power which the common law gave to him;⁴ and the result was that they both sometimes sold the land, at about the same time, one to one purchaser and the other to another, and both vendees apparently had perfect titles while claiming adversely to each other.⁵ Finally, such inconsistencies and evasions were sought to be done away with, and the objects of all the prior enactments merged, in the famous “Statute of Uses,” 27 Hen. VIII. ch. 10, which will be next discussed.

§ 302. **The Statute of Uses, 27 Hen. VIII. ch. 10 (1535).** — After reciting the numerous evils which it was intended to abolish,⁶ the Statute of Uses enacted, in substance, that when-

¹ A heriot was “a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.” Bouvier, Law Dict.

² 2 Blackst. Com. pp. *331, *332. These difficulties are stated in detail in the preamble to the Statute of Uses, 27 Hen. VIII. ch. 10.

³ See such acts as these more fully set forth and explained in Cruise, Dig. tit. xi. ch. ii. §§ 41–45.

⁴ Digby, Hist. Law R. P. (5th ed.) p. 345, note.

⁵ See Bispham’s Prin. Eq. Jur. § 53.

⁶ The preamble is long and recites a great variety of abuses which resulted from secret uses, trusts and confidences. Especially it declares that the objects of the enactment were “for the extirping and extinguishment of all such subtle practiced feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm . . . and to the intent that the king’s highness, or any other his subject of this realm, shall not in any wise hereafter, by any means or inventions be deceived, damaged, or hurt by reason of such trusts, uses and confidences.”

ever any person should be *seised* of real property to the use of another, the *cestui que use* should have the legal estate and possession *in the same quality, manner, form and condition* in which he had the use.¹ Its object was to do away with uses, by uniting the legal and equitable estates in the *cestui que use* and thus merging the latter estate in the former. The feoffee to uses was made a mere figure-head, from whom the legal estate and possession should pass as soon as the use vested in another person.² In the language of conveyancing, the statute was said to *execute* the use; i. e., it *destroyed* the use by merging it in the legal estate brought over to its owner from the feoffee to uses.³ It did this when the feoffee to uses, or holder of the legal estate, had the *seisin* of the property. And this process of execution was the investing of the *cestui que use* with the legal estate, *in the same quality, manner, form and condition* in which he had the use. Thus, if A were *seised* of one piece of land for the use of B in fee simple, of a second piece for the use of C for his life, of a third for the use of D as long as he should live on the land, and of a fourth for the use of E for ten years provided he did not attempt to assign his interest, the statute would execute all of these uses, and thereby confer the legal estate in the one piece of land upon B in fee simple, in the second piece upon C for his life, in the third upon D as long as he should live on the land, and in the fourth upon E for ten years provided he did not attempt to assign his interest. The statute consisted of thirteen sections, dealt carefully with several important interests much affected by uses, such as the jointure of a wife in lieu of her dower, and, among other consequences, was held to have done away entirely with the power of disposing of interests in realty by will, which power had been theretofore one of the most important results of the employment of uses.⁴ But the main and essen-

¹ Sections 1-3 of the statute; Digby, Hist. Law R. P. (5th ed.) pp. 347-351; Cruise, Dig. tit. xi. ch. iii. § 4.

² "The object of the statute was, by joining the possession or *seisin* to the use and interest (or, in other words by providing that all the estate which would by the common law have passed to the grantee to uses should instantly be taken out of him and vested in *cestui que use*), to annihilate altogether the distinction between the legal and beneficial owner-

ship, to make the ostensible tenant in every case also the legal tenant, liable to his lord for feudal dues and services — wardship, marriage, and the rest." Digby, Hist. Law R. P. (5th ed.) p. 346; Bac. Law Tracts, 322; Sand. Uses, 86, 87; Wms. R. P. p. *159; Chudleigh's Case, 1 Rep. 114, 124.

³ 2 Black-st. Com. p. *333; Bisham's Prin. Eq. § 53.

⁴ The courts held that, since under the statute the person to whom a use

tial change, which it proposed and of which its other features were incidents or results, was the *execution* of uses as above explained.

§ 303. **How the Statute of Uses was interpreted and construed.** — “The Statute of Uses,” said Lord Bacon, “is the most perfectly and exactly conceived and penned of any law in the books.”¹ But it opposed the current of general opinion and popular demand as to the ownership of real property; and the curious result was that its effects were directly the reverse of its purpose as conceived by its framers and enactors.² By means of it, unexpected forms of secret conveyances were introduced and have continued to be employed down to the present time. These will be hereafter discussed, in the portion of this work which deals with titles and conveyancing. By a strict and almost strained construction of the language of the statute, the old distinction between legal and equitable ownership and estates was also revived; and the use continued to flourish, though under the new name of a trust.³

After the enactment of the statute, the courts of common law, following out its intent, began to take cognizance of uses. Its interpretation and construction were mainly the work of those courts.⁴ Some of the results, at which they arrived, were undoubtedly correct and necessary. Thus, they held that, since the legal estate must leave the feoffee to use the instant he received it, the land could no longer escheat or be forfeited by his act or defect, nor be liable to dower or curtesy because of the seisin of such feoffee, nor be aliened by him discharged of the use. So the interest of the *cestui que use*, since it now included the legal estate, was held to be liable

was devised would acquire the legal estate as soon as he acquired the use, to will away the use was in effect to will away the legal estate. And, as a disposition of the latter by will was forbidden by the feudal law, it was decided that the statute of uses wholly did away with the possibility of devising realty. It would have been equally as logical, if not more so, for the courts to have argued that the will dealt with the use only and the fact that the statute then annexed the legal estate to the use was a result with which the will had nothing to do. The latter course of reasoning would have retained devises

of uses. But it was not adopted; and the result was that there were no wills of realty in England for five years — from the Statute of Uses, 27 Hen. VIII. ch. 10 (1535), to the Statute of Wills, 32 Hen. VIII. ch. 1 (1540). This fact is said to have been among the causes which led to the insurrection of 1536. 3 Freud's Hist. Eng. 91; Digby, Hist. Law R. P. (5th ed.) p. 346, u.

¹ Law Tracts, 324.

² Digby, Hist. Law R. P. (5th ed.) pp. 346, 347.

³ 1 Perry on Trusts, § 6.

⁴ 2 Blackst. Com. p. *333.

to ordinary common-law incidents, such as curtesy, forfeiture for crime, escheat, etc.¹ But the facts that the statute did not produce the results for which it was enacted and that uses continued to flourish, even with renewed vigor, were due to several strict and technical decisions of those same courts of law. Before discussing the three most important of those decisions — *the* three constructions which decided the destiny of uses and trusts — it is to be noted that it was held that the statute did not execute uses limited of copyhold lands,² nor uses of mere chattels,³ nor contingent uses as long as the events had not happened upon which the vesting of the uses depended.⁴

The *first* of the three most important decisions related to uses in estates for years. Since the statute was to operate only where one person was *seised* to the use of another, it was held by the courts of common law that it did not execute any use where the holder of the legal title had no greater interest than an estate for years.⁵ Thus, if land were conveyed to A for ten years, for the use of B for ten years, this use would not be executed, since A had no *seisin* and the case was clearly not within the *letter* of the statute. But it is to be carefully noted that, when the conveyance was to A and his heirs for the use of B for ten years, or to A for life for the use of B for ten years, since in such cases A had the *seisin*, the statute did operate and transfer the legal estate to B, to continue during the same term of years for which he was given the use.⁶

Second. It was further determined, by the common-law courts, that, when the feoffee to uses was required to convey the land, or to receive the rents and profits and pay them over to the beneficiary, or to perform any other active duties in regard to the property, the use, or trust, was not executed by the statute.⁷ Such a settlement made an *active trust*. And it has been uniformly and correctly held that such a trust was not within the *spirit* of the statute.⁸ To have concluded otherwise would often have resulted in taking the management of property from a competent trustee and placing it in

¹ Last preceding note.

² Gilbert, Ten. 170; Co. Lit. 272 a.

³ 1 Perry on Trusts, § 6.

⁴ Sanders, Uses, 240 *et seq.*

⁵ 2 Blackst. Com. p. *336; 1 Perry on Trusts, § 6.

⁶ 2 Prest. Conv. 219; Tud. Lead.

Cas. R. P. 265; Wms. R. P. pp. *184-
*188.

⁷ 2 Blackst. Com. p. *336; 1 Perry on Trusts, § 6; Kay v. Scates, 37 l'a. St. 31, 37; Hart v. Seymour, 147 Ill. 598, 611.

⁸ Pugh v. Hayes, 113 Mo. 424; N. Y. L. 1896, ch. 547, § 76.

the hands of an infant, a lunatic, or some other incapacitated *cestui que trust*.

Third. The farthest reaching and most strictly technical of these three important adjudications was the decision in *Tyrrel's Case*, to the effect that the statute would not execute a use "limited on a use;" i. e., if a use were created upon a use, the statute would execute only the first use, and would thus vest and retain the legal estate in the first named *cestui que use*.¹ Thus, upon the conveyance of land to A, for the use of B, for the use of C (or in trust or confidence for C), it was decided in this case, by the common-law court, that the statute would immediately transfer the legal estate from A to B and would then cease to operate upon it and leave it in B. And the same result must follow, no matter how many successive uses were declared in the instrument of conveyance. Accordingly, if realty were granted to A for the use of B, for the use of C, in trust for D, in confidence for E, the statute would simply take the legal estate to B, the first-named beneficiary, and there it must remain so far as the statute was concerned. Having operated once, in executing the first use, the force of the statute upon that conveyance was declared to be wholly expended; and it could not affect the other uses or trusts declared. "About the time of passing the Statute of Uses," says Mr. Watkins, "some wise man, in the plenitude of legal learning, declared there could not be a use upon a use. This wise dec-

¹ Dyer, 155. Divested of its technicalities, the effect of the conveyance of the land, by Jane Tyrrel in this case, was that she was to have the legal estate, for the use of her son, for the use of herself during her life, and, upon her death, for the use of her son and the heirs of his body, but if he had no heirs of his body then for the use of his heirs generally. In an opinion of three lines, the court declared that the statute executed the use in the son, that it then ceased to affect the title, and that the legal estate would not be taken from him by any further operation of the statute. "*Use ne poit estre engendre de use*," etc. At no point does English law bear stronger traces of the realistic doctrines of the Schoolmen than in such decisions as that of *Tyrrel's Case*. The mode of thought, which gave rise to such adjudications, has entirely passed

away. It treated the abstract use as a *real thing*, which must have injected into it a substantial seisin before it could be transformed into a legal estate. And the argument was that, when livery of seisin was made to A, for the use of B, for the use of C, there was no seisin given to B by the act of the parties. Nothing but a use was given to him. He held a use for C, but no seisin. When the statute took the seisin and legal estate from A, it took them for B and not for C. This was the same kind of reasoning which led to the doctrine of *scintilla jussis*, hereafter explained in connection with shifting uses. Also 36 Hen. VIII. B. N. C. 284; Doe *dem.* Lloyd v. Passingham, 6 Barn. & Cres. 305; Reid v. Gordon, 35 Md. 174, 183; Croxall v. Shererd, 72 U. S. 268; Sanders, Uses, 276; 1 Perry on Trusts, § 6.

laration, which must have surprised every one who was not sufficiently learned to have lost his common sense, was adopted and still is adopted, and upon it (at least chiefly) has been built up the present system of uses and trusts.”¹ For the courts of equity proceeded at once to declare that, in instances like those above stated, B was bound in good conscience to hold the property in trust for C, and C likewise must hold his equitable interest upon the further confidence or trust, if any, declared in the instrument of conveyance. And those courts proceeded by subpoena, as before the statute, to compel the owner of the legal estate (the one to whom the statute had transferred it—the first-named *cestui que use*—B, in the illustrations above given) and all the other designated beneficiaries to recognize and perform the trusts, duties, and confidences imposed upon them by the terms of the conveyance or settlement.² The use was thus restored, in full vigor, notwithstanding the Statute of Uses; but, in order to retain it, it was now usually necessary to convey the legal estate to one in whom it was not meant to remain, for the use of him in whom it was intended that it should remain, for the use of (or in trust for) the intended beneficiary. For example, if before the statute was enacted it were desired that A should hold a piece of land for the use of B, it was only necessary to convey it “to A for the use of B,” and thereupon A would hold the legal estate and B the equitable. If it were desired to bring about the same result after the statute went into operation, and Tyrrel’s Case had been decided, it could be done by conveying the property “to X for the use of A, for the use of B.” The statute then instantly vested the legal estate in A, and equity compelled him, as before, to hold it for the use of B. The desired effect was directly produced, before the statute was enacted; and afterwards it was produced indirectly by introducing a mere “dummy” as the first feoffee, and saying “to the use” twice. Hence the language of Lord Hardwicke as to the effects of the decision in Tyrrel’s Case: “By this means, a statute made

¹ Watkins, Conv. Introd. xx. “It had been settled before the statute, as a rule of property, that a use could not be raised upon a use.” 1 Perry on Trusts, § 6. The fundamental principle, therefore, upon which was rested the rule in Tyrrel’s Case, was that a use could not exist upon a use, and if such a thing were attempted the second

use was void—that, if land were conveyed to A for the use of B, for the use of C, C got *no use*, and therefore he had nothing to which the statute could carry the legal title. See citations of preceding note.

² Hopkins v. Hopkins, 1 Atk. 581; Wms. R. P. p. *161; 1 Perry on Trusts, § 6.

upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect than to add, at most, three words to a conveyance."¹ The doctrine of Tyrrel's Case is elementary law in those states of this country in which it has not been changed by statute.² (a)

§ 304. **How the Court of Chancery retained the Use, under the Name of a Trust.** — By the above-explained constructions of the Statutes of Uses, — chiefly by that in Tyrrel's Case, — and by the advantage taken of them by the courts of equity, the use, as such, continued to exist. But if it had been retained with all its objectionable features, which had caused the enactment of the Statute of Uses, there can be no doubt but that legislation would ultimately have swept it entirely out of existence. Therefore it behooved the court of chancery, or equity, which was endeavoring to preserve the use, to so deal with it as to remove the incentives for the enactment of another and possibly a more stringent statute of uses. This was done by giving to the old use a new name, and new and more equitable incidents and characteristics.

The original distinction between a use and a trust has been heretofore explained.³ After the decision in Tyrrel's Case, and the consequent revival of the use, this distinction in nomenclat-

(a) In New York, the rule of Tyrrel's Case has been abrogated since Jan. 1, 1830. The statute, which was formerly 1 R. S. 737, §§ 47, 48, is now § 72 of ch. 547, L. 1896 (Real Prop. Law), and reads as follows: "Every person who, by virtue of any grant, assignment, or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions as his beneficial interest; but this section does not divest the estate of the trustee in any trust existing on the first day of January, eighteen hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust." *Wendt v. Walsh*, 164 N. Y. 154. See also note on New York express trusts, at the end of Ch. XXI. *infra*.

¹ *Hopkins v. Hopkins*, 1 Atk. 581. "It appears that, by the time of Sir E. Coke, the uses upon uses which the common-law courts refused to recognize were enforced in Chancery. Thus was restored the distinction between the equitable and the legal estate, which it had been the design of the Statute of Uses to abolish." Digby, *Hist. Law R. P.* (5th ed.) p. 372.

² In many of the United States, such as Georgia, Michigan, New Jersey, New York, and Wisconsin, the rule in Tyrrel's Case is abolished by statute; and where the holder of the legal estate is not given any active duty to perform, that estate passes to the ultimate beneficiary named in the grant or devise. 1 *Stim. Amer. Stat. L.* § § 1701, 1702.

³ § 298, *supra*.

ure was discarded; and both of these forms of equitable estates were called *trusts*.¹ When, therefore, real property was conveyed to A, for the use of B, for the use of C, B became *trustee* for C, and C, to whom the "second use" was given, was the *cestui que trust*. It then became necessary to make the division, which is still retained, of all express trusts into two classes, namely, active and passive. The passive express trust of to-day is the old use with its new name; and the active express trust is practically the trust so called before the Statute of Uses.

The incidents and characteristics of the use, now called a passive express trust, were also materially changed, by the application to it of the maxim that "equity follows the law."² By this is meant that, as far as their inherent nature will permit, equity applies to these equitable estates those rules of law by which legal titles and interests are regulated.³ Thus, they are descendible, devisable, and alienable in the same manner as legal estates.⁴ They may be reached in equity by creditors for the satisfaction of debts;⁵ in England by virtue of statutes,⁶ and in this country by judicial decisions, they may escheat on the death of their owners without heirs who can inherit them,⁷ and they are forfeitable for treason.⁸ In applying the maxim that equity follows the law, it was soon decided, also, that a husband may have curtesy in the equitable estates owned by his wife, unless on there being conveyed to her for her sole and separate use his marital rights in them are expressly

¹ Digby, Hist. Law R. P. (5th ed.) p. 372.

² Burgess v. Wheate, 1 Wm. Blackst. 123, 155; Croxall v. Shererd, 72 U. S. 268, 281.

³ Bispham's Prin. Eq. § 38. See Magniac v. Thomson, 15 How. (U. S.) 281; Hedges v. Dixon Co., 150 U. S. 182-192.

⁴ Burgess v. Wheate, 1 Wm. Blackst. 155, 161; Price v. Sisson, 13 N. J. Eq. 168, 174; Cornwell v. Orton, 126 Mo. 355; Faries' Appeal, 23 Pa. St. 29; Fearne, Cont. Rem. p. 284; 2 Lewin on Trusts, p. *823.

⁶ The *cestui que trust* can not hold and enjoy the property freed from the duty of having it applied to the satisfaction of his debts. And this has been the rule of equity, practically ever since the decision in Tyrrel's Case. Dum-

por's Case, 1 Smith's Lead. Cas. 119, Judge Hare's note; Nichols v. Levy, 5 Wall. (U. S.) 433, 441; Hallett v. Thompson, 5 Paige (N. Y.), 583; Blackstone Bank v. Davis, 21 Pick. (Mass.) 42; Easterly v. Keney, 36 Conn. 18, 22; Taylor v. Harwell, 65 Ala. 1.

⁶ 47 & 48 Vict. ch. 71, § 4.

⁷ Johnston v. Spicer, 107 N. Y. 185; Matthews v. Ward, 10 Gill & J. (Md.) 443, 454.

⁸ This is the result of statute in England. 33 Hen. VIII. ch. 20. Before this, in all cases of forfeiture, the trustee took the property freed from the trust. Burgess v. Wheate, 1 Eden, 199. In this country, practically the only forfeiture of property is for treason, during the life of the person attainted, and this applies to all kinds of property alike.

excluded.¹ But, when the question arose as the wife's dower in property held in trust for her husband, it was decided that she should not be endowed of such estates, because presumably she was already provided for by a jointure or marriage settlement, and titles would be disarranged by giving her dower.² And such was the law of England, until by the Dower Act of 1834 (3 & 4 Wm. IV. ch. 105) this anomaly was removed, and dower was added as an incident to equitable estates. In most of the states of this country, a widow has always been dowable out of equitable estates of her husband.³ It is to be added that, in dealing with *executory* trusts, which will be more fully explained hereafter,⁴ and which are trusts in an inchoate condition, with their full quality or duration yet to be determined by the trustee, equity will often refuse to apply the strict rules by which legal estates are governed.⁵

In a general summary, it may be said that, after the decision in *Tyrrel's Case*, the courts of equity retained the old use with the new appellation of a trust, and applied to it the same principles which courts of law apply to legal estates, except that, for a long time they recognized no dower in it, in many instances they refused to follow the law in dealing with executory trusts, and they would not follow the law in cases in which such a course would be inconsistent with the nature of the equitable estate itself, as in the instance of the exclusion of curtesy from a trust for the sole and separate use of a married woman. By these methods, equity retained, moulded, and perfected the different forms of trusts, which now constitute so large and important a part of our real property, and which are next to be classified and discussed.

¹ *Roberts v. Dixwell*, 1 Atk. 607; *Morgan v. Morgan*, 5 Madd. 408; *Cochran v. O'Hern*, 4 W. & S. (Pa.) 95, 99; *Rigler v. Cloud*, 14 Pa. St. 361, 363; *Lewin on Trusts*, pp. *11, *221, *733; 1 *Perry on Trusts*, § 323.

² *Co. Lit.* 208 a (n. 105); *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Mayburry v. Brien*, 15 Pet. (U. S.) 21, 38; 1 *Perry on Trusts*, § 323.

³ *Shoemaker v. Walker*, 2 Serg. & R. (Pa.) 554; *Hawley v. James*, 5 Paige (N. Y.), 318; *Mershon v. Duer*, 40 N. J. Eq. 333; *Stroup v. Stroup*, 140

Ind. 179. See *Phelps v. Phelps*, 143 N. Y. 197; *Nichols v. Park*, 78 N. Y. App. Div. 95. But in Maine and Massachusetts a wife is not dowable of her husband's equitable estates. *Hamlin v. Hamlin*, 19 Me. 141; *Reed v. Whitney*, 7 Gray (Mass.), 533; *Lobdell v. Hayes*, 4 Allen (Mass.), 187.

⁴ § 309, *infra*.

⁵ *Wood v. Burnham*, 6 Paige (N. Y.), 513; *Pillot v. Landon*, 46 N. J. Eq. 310, 313; *Bartlett v. Remington*, 59 N. H. 364; 4 *Kent's Com.* p. *219.

(2) TRUSTS.

CHAPTER XX.

KINDS OF TRUSTS.

§ 305. Classification of trusts.	§ 309. Executed and executory trusts.
§ 306. Trusts, lawful and unlawful.	§ 310. Trusts, <i>a.</i> Express [(a) Active, (b) passive], and <i>b.</i> Implied [(a) resulting, (b) constructive].
§ 307. Trusts, active or special, and passive, simple, or general.	
§ 308. Trusts, private and public, or charitable.	

§ 305. **Classifications of Trusts.** — The different methods of classifying trusts, which have been adopted by courts and text-writers, may often lead to confusion, unless the reader is constantly alert as to the meaning which is to be attached in each case to the terms employed. This is specially true as to the expression “implied trusts.” It is, therefore, necessary, in approaching the discussion of trusts, to explain carefully the meanings of the various kinds of them which are to be described and examined. The divisions and meanings here adopted are believed to be those which are most natural and most commonly accepted and used by the best judges and writers.

§ 306. **Trusts, Lawful and Unlawful.** — One division of all trusts, which practically defines itself, is into *lawful* and *unlawful*. Most trusts are, of course, lawful; that is, they exist for some fair and honest purpose recognized and upheld by law. An illustration of an unlawful trust would be one for some vicious or immoral purpose, or otherwise in violation of public policy or statutes; as a trust to encourage crime, or to violate the excise laws, or the statutes of mortmain, or those in regard to aliens,¹ or the so-called “Sherman

¹ Bacon on Uses, 9; *Servis v. Nelson*, 14 N. J. Eq. 94; *Snell v. Dwight*, 120 Mass. 9; *Dunham v. Presby*, 120 Mass. 285.

Anti-Trust Law" of the United States.¹ Equity brought the trust into existence, as a new estate; but no court will uphold it for any illegal purpose.

§ 307. **Trusts, Active or Special, and Passive, Simple, or General.** — As already explained, an active or special trust is one in which something is required to be done by the trustee, in order to carry out the intention of the settler, as to keep the property in repair, to sell or mortgage it, to receive the rents and profits, and to pay them over to the *cestui que trust*, and the like; while a passive trust—or, as it is sometimes called, a simple or general trust—merely vests the legal title in the trustee as a kind of receptacle, but imposes no active duty upon him.² Most of the implied trusts (as the word "implied" is used in this treatise) are passive; while some express trusts are active and others passive. Therefore trusts as active and passive are more fully discussed hereafter, as subdivisions of express trusts.

§ 308. **Trusts, Private and Public, or Charitable.** — Private trusts are those in which the beneficial interests are vested in one or more individuals, or families, who are definitely ascertained, or may be so within a certain time. They must not only be for the benefit of certain and determined individuals; but they are also generally limited in their duration, being restricted in time, by the so-called rule against perpetuities, to a period of not more than a life or lives in being and twenty-one years, and the period of gestation of a child in addition.³ Public or *charitable* trusts are not thus restricted, but have three leading and distinguishing features, namely: *first*, their purpose must be some public utility, and, therefore, they must exist for the benefit of the public generally, or of some considerable portion of it which answers to a particular description;⁴ *second*, their beneficiaries must be indefinite as to the individuals⁵ and *third*, they are not restricted, as to time, by the rule against perpetuities, but

¹ 26 U. S. Stat. at Large, 209; United States v. E. C. Knight Co., 156 U. S. 1; United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290; United States v. Joint Traffic Ass'n, 171 U. S. 505. See More v. Bennett, 140 Ill. 69; People v. North Riv. Sug. Ref. Co., 121 N. Y. 582; Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 43; 1 Perry on Trusts (5th ed.), § 21, note.

² § 298, *supra*.

³ Rice v. Barrett, 102 N. Y. 161; Manice v. Manice 43 N. Y. 303.

⁴ Doyle v. Whalen, 87 Me. 414, 425; Lewin on Trusts, p. *20; 2 Perry on Trusts, § 697.

⁵ Philadelphia v. Fox 64 Pa. St. 169, 182; Jackson v. Phillips, 14 Allen (Mass.), 539, 550; Hopkins v. Grimshaw, 165 U. S. 342, 352.

may be made to continue indefinitely.¹ Charitable trusts will be more fully discussed hereafter, as one of the forms of express trusts.

§ 309. **Executed and Executory Trusts.** — In a broad, general sense, all trusts are executory; that is, there is some duty, either active or passive, for the trustee to perform, or execute. But such is not the meaning of the courts when they speak of an "*executory* trust." The distinction between such a trust and one which is *executed* has to do rather with the completeness and perfection of their creation by the settler, than with the conduct of the trustee in performing the duties of his office.² An *executed* trust is one so clear and definite, in the terms by which it is created, that the trustee has nothing to do but to carry out literally the requirements and provisions of the instrument.³ The settler, or creator, of such a trust has become "his own conveyancer;" and has made the trustee merely a medium for carrying out his purpose as expressed in the making of the trust.⁴ An *executory* trust, on the other hand, is one in which property is conveyed to a trustee, to be by him settled or conveyed upon other trusts, on the happening of designated events or contingencies; and those other trusts are only outlined, or imperfectly stated, so that the trustee is given a discretion in filling out the details and completing the scheme of the trust. The settler has not become his own conveyancer; but has left it to the trustee and the court to make out his intention from general expressions. It is called executory, not because the work of the trustee in carrying out the trust is to be performed in the future, but because the trust instrument is to be filled out and perfected in accordance with the general instructions of the settler.⁵ Thus, if land be conveyed to A, in trust to manage and pay the net income to B during his life, and at B's death to divide the *corpus* equally among his children then living, the trust is executed. But if real property be given to A, in trust to settle the same upon B and C and their issue, in case

¹ *Hopkins v. Grimshaw*, 165 U. S. 342; *Andrews v. Andrews*, 110 Ill. 223; *Mills v. Davison*, 54 N. J. Eq. 659.

² 1 *Perry on Trusts*, § 359.

³ *Wright v. Pearson*, 1 Eden, 119, 125; 4 *Kent's Com.* p. *220.

⁴ *Edgerton v. Brownlaw*, 4 H. L. Cas. 1, 210; *Glenorchy v. Bosville*, 1

Lead. Cas. Eq. 1, note; *Gaylord v. La Fayette*, 115 Ind. 423; *Tillinghast v. Coggeshall*, 7 R. I. 383.

⁵ *Austen v. Taylor*, 1 Eden, 361, 366; *Neves v. Scott*, 9 How. (U. S.) 196, 211; *Wood v. Burnham*, 6 Paige (N. Y.), 518, 26 Wend. (N. Y.) 9; *Cushman v. Coleman*, 92 Ga. 772.

they intermarry, and nothing more be expressed as to the terms and conditions of such settlement, the trust is executory.¹ In both of these illustrations, the work of the trustee is to be done in the future. But, in the former, he has only to carry out the provisions of a fully declared trust; while, in the latter, he is to participate in moulding and perfecting the trust scheme itself.

The most important practical distinction between executed trusts and those that are executory is that equity strictly follows the law in dealing with the former, but frequently fails to do so in carrying out the latter.² In the one, the rules of law prevail, even though the settler's intention may be thereby defeated; in the other, his intention is sought to be effectuated, even though technical rules of law may be thereby sometimes disregarded.³ If, for example, a lot of land were deeded to A, in trust to manage for B during his life, and at B's death for his children equally, the children would obtain only life estates, since the ultimate gift was not to them and their heirs, and the technical rule of the common law requires the use of the word "heirs," in order to thus convey an interest greater than one for life.⁴ But if the grant or devise were to A in trust to manage for B during his life, and at his death to settle upon his children, the terms of the settlement being left indefinite and not fully prescribed; when the formal instrument, by which this general scheme was to be carried out, came to be drawn, the ultimate settlement would be made upon B's children *and their heirs*, thus giving them absolute estates in fee simple, if this could fairly be regarded as the intention of the grantor or testator.⁵

In dealing with an executory trust, a court of equity is constantly seeking to ascertain and carry out the intention of

¹ *Austen v. Taylor*, 1 Eden, 361, 366; *Cushing v. Blake*, 30 N. J. Eq. 689; *Carney v. Cain*, 40 W. Va. 758.

² *Wright v. Pearson*, 1 Eden, 119; *Jones v. Morgan*, 1 Brown, C. C. 206; *Price v. Sisson*, 13 N. J. Eq. 168; *Smith's Estate*, 144 Pa. St. 428.

³ *Ibid.* "In practice the chief distinction between an executed and an executory trust lies in the fact that the former executes itself by converting its limitations into the corresponding legal estates, whereas in the latter, the court may direct that form of conveyance or

settlement which will best give effect to the settler's intention, and for this purpose may even disregard the construction the instrument would receive at law." *Pilot v. Landon*, 46 N. J. Eq. 310, 313.

⁴ *Holliday v. Overton*, 14 Beav. 467; *Lucas v. Brandreth*, 28 Beav. 274; *Nelson v. Davis*, 35 Ind. 474.

⁵ *Moore v. Cleghorn*, 10 Beav. 423; *Watkins v. Weston*, 32 Beav. 238; *Doe v. Cafe*, 7 Exch. 675. See *Pitman v. Pitman*, 11 Lawy. Rep. Ann. 456, and note.

the settler, even at the expense of hard and rigid principles of law. The evidence of intention is to be gathered, of course, primarily from the entire instrument by which the general scheme is outlined. When, for example, the scheme or general plan is contained in a will, the whole document — including the parts which do not bear directly upon the trust — is to be studied, in the light of the testator's condition and surroundings; and the trust is to be moulded in accordance with the clear intent thus ascertained.¹ But, in shaping an executory trust outlined by a marriage settlement, the court is aided also by the *presumption* that the intention of the settler was to benefit the *issue* of the marriage.² No such presumption exists in the construction of wills; but the intent must plainly appear from the words of the testator.³ There is, indeed, no difference between the rules of interpretation and construction of wills, and those which apply to marriage settlements; the intention alone is sought in both; but in dealing with the latter documents *res ipsa loquitur*, the occasions which give rise to them evince what may be presumed to have been the paramount object of the settlers.⁴ This presumption will readily yield, of course, to a contrary intent clearly expressed in the marriage articles.

When it is said that equity in dealing with an executory trust may disregard technical rules of law, it must not be understood that that court may thereby produce any result that is in itself *illegal*. It simply chooses among possible legal constructions that which most nearly conforms to the expressed or presumed intention of the settler, rather than that which follows hard and fast principles of interpretation. This is apparent from the illustrations already given. And, it is to be added, that in striving to effectuate the wishes of the creator of the trust, even where he has outlined a scheme that is partly illegal, equity will construe the instrument *cy pres*, — as nearly as possible to, — his expressed intention, and will give effect to the legal parts of his plan, if they can

¹ *Blackburn v. Stables*, 2 Ves. & Bea. 367, 369; *Sweetapple v. Bindon*, 2 Vern. 536; *Roe v. Vingut*, 117 N. Y. 202, 204; *Clark v. Cammann*, 160 N. Y. 315, 324; *In re Hammer's Est.*, 158 Pa. St. 632; *Adams v. Cowen*, 177 U. S. 471.

² *Sackville-West v. Holmesdale, L.*

R. 4 H. L. 543, 565; 1 *Perry on Trusts*, §§ 360-366.

³ *Sweetapple v. Bindon*, 2 Vern. 536; 1 *Perry on Trusts*, § 366.

⁴ *Sackville-West v. Holmesdale, L. R.* 4 H. L. 543, 565; *Bispham's Prin. Eq.* § 57.

be properly and fairly separated from the portions which are illegal.¹ Thus, where a devise was made to a trustee, to settle the property upon A for life, and then to his first son for life, and then to that son's son for life, and so on for many generations yet to come into being, it was held that the attempt thus to create life estates for persons not in being was void, because it violated the rule against perpetuities, but that the general scheme of the testator should be effectuated as nearly as possible, by giving trust interests for life to the sons in being, and the ultimate ownership absolutely or in fee simple to their children.² But, when the gift is such that it can not legally be carried out in any form approximating the intention of the settler without contravening some positive statute or rule of law, the entire trust, whether executed or executory, is void.³

§ 310. **Trusts: a. Express; and b. Implied.** — The most important division of trusts is that made in reference to the mode of their creation, into *a.* Express and *b.* Implied.

a. Express trusts are such as are created by the language of the parties. They may arise from explicit statements, whereby the relation of trustee and *cestui que trust* is plainly established, or from expressions of a less certain character, which the courts have uniformly construed as evincing an intent to create a trust.⁴ Some writers, among whom Mr. Perry is prominent, call those trusts *implied*, which are not unequivocally expressed in direct terms, but are to be spelled out by the court "from the whole transaction and the words used."⁵ But this style of nomenclature is opposed by the best courts and the majority of careful writers.⁶ If the maker of the instrument declare the trust by any form of words, it should be called an express trust; and it will be so named in this treatise. Confusion is avoided and a system in harmony with the great weight of authority is produced by classifying as express all trusts which are declared by the words of the parties, whether in explicit terms, or by the employment of such language as will not reveal a trust unless it is carefully

¹ *Humbertson v. Humbertson*, 2 Vern. 737; 1 Perry on Trusts, § 376.

² *Humbertson v. Humbertson*, 2 Vern. 737; *Bailey v. Bailey*, 28 Hun (N. Y.), 603.

³ *Blagrove v. Hancock*, 16 Sim. 371; *Manice v. Manice*, 43 N. Y. 303.

⁴ *Bispham's Prin. Eq.* § 63.

⁵ 1 Perry on Trusts, § 112.

⁶ *Neal v. Clark*, 95 U. S. 704, 709; *Mulock v. Byrnes*, 127 N. Y. 23; *Cronon v. Cotting*, 104 Mass. 245; *Bispham's Prin. Eq.* § 78.

read in the light of established rules of interpretation and construction. As thus understood, express trusts include those which are *precatory*; that is, those created, not by direct words of command, but by expressions of hope, request, expectation, entreaty, and the like.¹ Charitable trusts, and several other special forms of these equitable estates are also to be examined as species of express trusts. An express trust may be either (a) active or (b) passive.

b. Implied trusts, as the term is generally and more properly employed, are those which arise by implication of equity, either for the purpose of carrying out the presumed *intention* of the parties, or to work out *justice* between them regardless of what their intention may have been. They rest, not upon the wording or construction of any contract or instrument, but upon the acts and transactions of the interested parties. Those which are implied for the purpose of carrying out the presumed *intention* of the parties are (a) *resulting* trusts. And those which are implied to work out *justice*, regardless of what the parties to the transactions may have intended, are (b) *constructive* trusts.²

The ultimate analysis of these various forms of trusts, classified with respect to the mode of their creation, leads to their discussion under two chief divisions and four subdivisions, namely: a. Express trusts, which are, (a) active and (b) passive; b. Implied trusts, which are, (a) resulting and (b) constructive.

¹ Knight v. Knight, 3 Beav. 148, 173; Hill v. Hill (1897), 1 Q. B. 483; Clay v. Wood, 153 N. Y. 134; Colton v. Colton, 127 U. S. 300.

² Bispham's Prin. Eq. § 78; 1 Perry on Trusts, §§ 26, 27.

CHAPTER XXI.

a. EXPRESS TRUSTS. — THEIR CREATION, REVOCATION, REQUISITES, AND FORMS. — POWERS IN TRUST.

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Creation of Express Trusts.

§ 311. **Creation of Express Trusts at Common Law.** — At common law the most ordinary method of conveying corporeal hereditaments was by means of livery of seisin, frequently accompanied by a deed of feoffment. But the deed, although customarily used, was not necessary. The livery of seisin, in the presence of the witnesses, — the handing over, by the one party to the other, of a stone, twig, clod of earth, or other symbol, either on the land itself, or within sight of it, — was a sufficient ceremony to accompany the oral statement that this was done in the name of seisin and for the purpose of transferring the property.¹ Practically, all authorities are now agreed that any property of which the legal estate could be thus conveyed could be settled to use or in trust by oral statement. Technically, trusts were said to be “averrable;” that is, they could be declared and created by word of mouth.² But the better opinion is that, when a deed was needed for the conveyance of the legal estate, a deed was also requisite to the proper declaration of a trust. Thus, a transfer by covenant to stand seised to uses, which method of conveying the legal estate will be hereafter explained, required a deed for the raising of a use or trust.³ And it seems to be safe to assert, though upon no direct authority, that a writing was necessary to the declaration of a trust in incorporeal hereditaments, because the creation and transfer of legal estates in them must be by deed of grant. And so the law remained until the Statute of Frauds went into operation, in 1677.

§ 312. **Proof required by the Statute of Frauds.** — By the seventh section of the English Statute of Frauds, it was enacted that “all declarations or creations of trusts, or confidences of any lands, tenements, or hereditaments, shall be *manifested*

¹ 2 Sand. Uses and Trusts, 1–8; § 287, *supra*.

² *Fordyce v. Willis*, 3 Bro. Ch. 577, 587; *Adlington v. Cann*, 3 Atk. 141; 1 *Perry on Trusts*, § 75.

³ *Gilbert on Uses*, 270; *Adlington v. Cann*, 3 Atk. 141; *Fordyce v. Willis*, 3 Bro. Ch. 577, 587.

and proved by some writing signed by the party who is by law entitled to declare such trust, or by his last will in writing; or else they shall be utterly void and of none effect." The eighth section excepted from the operation of the statute all trusts which arise or result by implication or construction of law; that is, it left all *implied* trusts unaffected by the statute. And the ninth section provided that "all grants or assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect."¹ Those three sections of the act, then, were made to regulate the proof and transfer of express trusts of real property. All estates for years and leasehold interests, as well as freehold estates, are within the statute; but not mere personal interests or claims in land.² The statute does not affect trusts of personalty;³ and where real property is transferred to a trustee under an oral trust in itself unenforceable because of the statute, if the terms of the agreement be so far performed that the property is converted into personalty, the oral declaration of trust then becomes sufficient, and the trustee can be compelled to carry out its provisions.⁴

§ 313. **The Statute a Rule of Evidence.** — The Statute of Frauds, in this seventh section, as well as in most of its other departments, prescribes a rule of evidence, rather than a requirement as to manipulating property.⁵ It does not demand that trusts of real property shall be *created* by a writing; but enacts that they "shall be *manifested and proved* by some writing." The evidence of the existence of the trust must be written, or the *cestui que trust* is without remedy against the trustee. But, whatever may have been the actual meaning intended by its framers, the uniform construction of this section has been that it does not forbid the *making* of a real property trust by parol.⁶ Such a trust may be brought into

¹ 29 Car. II. ch. 3, §§ 7, 8, 9.

² Benbow v. Townsend, 1 Myl. & K. 506; Skett v. Whitmore, Freem. 280; Hutchins v. Lee, 1 Atk. 447; Bellasis v. Compton, 2 Vern. 294.

³ Hirsh v. Aner, 146 N. Y. 13, 19; 1 Perry on Trusts, § 86.

⁴ Bork v. Martin, 132 N. Y. 280; *In re Simond's Estate*, 201 Pa. St. 413; *State v. Rondebush*, 114 Ind. 347; *McCormick H. M. Co. v. Griffin*, 116

Iowa, 397; *Owens v. Williams*, 130 N. C. 165.

⁵ *Hutchins v. Van Vechten*, 140 N. Y. 115, 118; *Crane v. Powell*, 139 N. Y. 379; *Forster v. Hale*, 3 Ves. 696, 707.

⁶ *Forster v. Hale*, 3 Ves. 696, 707; *Randall v. Morgan*, 12 Ves. 67, 74; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1; *Barrell v. Joy*, 16 Mass. 227; *Hutchins v. Van Vechten*, 140 N. Y. 115; *Martin v. Baird*, 175 Pa. St. 540; 1 Perry on Trusts, § 79.

being by oral contract or settlement, and exist for a time as an unenforcible but otherwise valid arrangement; and a writing may then be executed which will relate back and make the trust enforcible *ab initio* by the *cestui que trust*. Accordingly, in an early case, a testator was held capable of devising by his will, which could not pass real property acquired by him after its execution, his interest as *cestui que trust* in a tract of land, the trust in which was orally *created* in his favor before the will was executed, although the written acknowledgment of the trust was not made until some time after the will.¹

§ 314. **Forms and Operation of the Statute in the United States.** — In most of the United States, this seventh section of the old English Statute of Frauds has been re-enacted or tacitly adopted. Its phraseology has been changed in a few of the states, so as apparently to require that trusts of real property must be made, or brought into being, by a writing. Thus, in Maine,² Massachusetts,³ Vermont,⁴ Indiana,⁵ and Wisconsin,⁶ the form of the statutes is, in substance, that such trusts shall be "*created and declared*" in writing; while in Illinois, "*declarations or creations of trusts must be manifested and proved*" in writing.⁷ But the view is now generally accepted that such changes of words have not altered the general rule, as settled with reference to the Statute of 29 Car. II. ch. 3, and that, under all of these enactments, a writing will be sufficient to establish a trust in real property, although it is not executed until after the trust is orally created.⁸ The Court of Appeals of New York has declared, however, that, between 1829 and 1860 the statute of frauds of that state did not permit such a trust to "*be created or established except by a deed or conveyance in writing.*" Before January 1, 1830, the form of the New York statute was substantially the same as that of England; and by chapter 322 of

¹ *Ambrose v. Ambrose*, 1 P. Wms. 321. "There is a distinction between an agreement and a trust under the Statute of Frauds, and a trust need not, like an agreement, be constituted or created by writing." Kent, Ch. in *Moran v. Hays*, 1 Johns Ch. (N. Y.) 339, 342.

² Rev. Stats. (1857) ch. 73, § 11.

³ *Jenkins v. Eldridge*, 3 Story (U. S. Cir. Ct.), 181, 294; *Blodgett v. Hildreth*, 103 Mass. 484, 486.

⁴ *Pinnock v. Clough*, 16 Vt. 500, 508.

⁵ Rev. Stats. (1881) § 2969.

⁶ *Begole v. Hazzard*, 81 Wis. 274.

⁷ Rev. Stats. (1877) § 9, p. 522; *Horne v. Ingraham*, 125 Ill. 198.

⁸ *Sheet's Est.* 52 Pa. St. 257; *Jaques v. Hall*, 3 Gray (Mass.), 194; *Browne, Stat. of Frauds*, § 109; 1 *Perry on Trusts*, § 81.

its laws of 1860, that form was practically restored in New York, and since that time has been continuously retained.¹ (a)

§ 315. **The Writing required by the Statute.** — The writing, required by the statute to “manifest and prove” a trust of real property, must clearly indicate the objects and nature of the trust, the parties to it, the relations which they sustain to one another, and the proportions in which they are to take,

(a) The history of the statute in New York is as follows: “The English statute on this subject (29 Car. II. ch. 3), in its essential features was enacted in this state by the act of Feb. 26, 1787, the 12th section of which provides that ‘all declarations or creations of trusts of any lauds shall be manifested and proved by some writing signed by the party entitled by law to declare the trust.’ Thus the law stood for about forty years, until the general revision of the statutes, when it was changed and made to read as follows: ‘No estate or interest in lands, other than leases for a term not to exceed one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing.’ (2 R. S. 135, § 6.) After the revision, a trust of the character claimed by the plaintiff in this case,” (an express trust of realty), “could not be created or established, except by a deed or conveyance in writing. But, by chapter 322 of the laws of 1860, the legislature restored the law to its original condition, by an amendment to the seventh section, substantially providing that a declaration of trust in lands might be *proved* by any writing subscribed by the party declaring the same. It is not now necessary to produce a deed or formal writing intended for the purpose, in order to prove the trust, but letters or informal memoranda signed by the party, and even admissions in a pleading in another action between other parties, if signed by the party with knowledge of its contents, will satisfy the requirements of the statute, if they contain enough to show the nature, character, and extent of the trust interest.” O’Brien, J., in *Hutchins v. Van Vechten*, 140 N. Y. 115, 118. See also *Crane v. Powell*, 139 N. Y. 379; *Bates v. Lidgerwood Mfg. Co.*, 130 N. Y. 200; *McArthur v. Gordon*, 126 N. Y. 597. It was said in *Cook v. Barr*, 44 N. Y. 157, that the change in the wording of the statute between 1830 and 1860 did not change the meaning, and that it has always been sufficient in New York to *manifest* and *prove* a trust in writing. But it is to be noted that both this statement and that quoted above from *Hutchins v. Van Vechten* are merely *dicta*, and that there is no actual adjudication upon the question in New York. But the *dictum* of *Hutchins v. Vechten* is to be taken as the stronger, as well as the later, and as probably expressing the law to be hereafter followed.

The statute, substantially in the form quoted by Judge O’Brien in the last-mentioned case, is now § 207 of the Real Property Law, L. 1896, ch. 547.

¹ *Hutchins v. Van Vechten*, 140 N. Y. 115.

and, in general, all the material elements of the contract or settlement.¹ But no particular form of the writing is required. A mere memorandum, an affidavit,² a note at the end of a deed,³ or even a letter, though addressed to some third party, if properly signed and adequately expressing what the trust is, will comply with the requirements of the statute.⁴ When the writing consists of several distinct papers or sheets, and one is properly signed, or *subscribed*, as the statute may require, the generally adopted rule is that there must be in the signed sheet a reference sufficient to identify and connect with it the sheets or portions which are not signed.⁵

In cases in which certain formalities are requisite to the transfer of the legal estate, if a trust be declared by the same instrument, or in the same transaction, those formalities must also be observed in the writing by which the trust is manifested and proved. Thus, in those jurisdictions which require a married woman's deed of real property to be acknowledged separately and apart from her husband, her declaration of a trust in such property must be acknowledged in the same manner.⁶ And when it is sought to convey realty by will, to one person in trust for another, the trust thus *originating* in the will, the instrument must be executed as required by the Statute of Wills of the state in which the land is situated.⁷ But if the trust were created by contract or declaration outside of the so-called will, so that the latter is simply employed

¹ *Forster v. Hale*, 3 Ves. 696, 708; *Steere v. Steere*, 5 Johns. Ch. (N. Y.) 1; *Finley v. Isett*, 154 U. S. 561; *Cook v. Barr*, 44 N. Y. 157, 161; *Hutchins v. Van Vechten*, 140 N. Y. 115, 118; *Emerson v. Galloupe*, 158 Mass. 146; *Taft v. Dimond*, 16 R. I. 584; *Leslie v. Leslie*, 53 N. J. Eq. 275; *Martin v. Baird*, 175 Pa. St. 540; *Salisbury v. Clarke*, 61 Vt. 453, 459; *Renz v. Stoll*, 94 Mich. 377; 1 *Perry on Trusts*, § 83.

² *Barkworth v. Young*, 4 Drew, 1; *Pinney v. Fellows*, 15 Vt. 525.

³ *Ivory v. Burns*, 56 Pa. St. 300. And see *Preston v. Preston*, 202 Pa. St. 515.

⁴ *Plymouth v. Hickman*, 2 Vern. 167; *Dale v. Hamilton*, 2 Phillips, 266; *Hutchins v. Van Vechten*, 140 N. Y. 115; *Tusch v. German Sav. Bk.*, 46 N. Y. Supp. 422; *Roberts's Appeal*, 92 Pa. St. 407; *Barrell v. Joy*, 16 Mass.

227; *Larrabee v. Hascall*, 88 Me. 511; *Cathcart v. Nelson*, 70 Vt. 317; *Eipper v. Benner*, 113 Mich. 75; 1 *Perry on Trusts*, § 82.

⁵ *Denton v. Davis*, 18 Ves. 499, 503; *Champ v. Marshallsay*, 64 L. T. 13; *Knowlton v. Atkins*, 134 N. Y. 313; *McAuley's Est.*, 184 Pa. St. 124; *Eipper v. Benner*, 113 Mich. 75; *Hanning v. Mueller*, 82 Wis. 235; *Atwater v. Russell*, 49 Minn. 57.

⁶ *Graham v. Long*, 65 Pa. St. 383, 387; *Tatge v. Tatge*, 34 Minn. 272.

⁷ *Adlington v. Cann*, 3 Atk. 141; *Stickland v. Aldridge*, 9 Ves. 516; *Champ v. Marshallsay*, 64 L. T. 13; *Thayer v. Wellington*, 9 Allen (Mass.), 283; *Davis v. Stambaugh*, 163 Ill. 557; *Chase v. Stockett*, 72 Md. 235; 1 *Lewin on Trusts*, ch. v. § 3; 1 *Perry on Trusts*, §§ 89, 90.

as written proof of a trust already in existence, it may satisfy the requirements of the Statute of Frauds, although it fail to comply with all the formalities prescribed by the Statute of Wills. If, for example, A deed land to B, who orally agrees that he will hold it in trust for C, B may subsequently manifest and prove this trust by his declaration properly signed, in a writing which he calls his will, but which is invalid as a will, because not executed with the proper statutory formalities.¹ But if A, by his will, attempt to devise land to B, in trust for C, thus seeking to *create* the trust in the will, the entire scheme must fail if the document be not executed in the manner required by the statute of the state in which the land lies.²

An answer in chancery may be a writing sufficient to comply with the statute.³ The courts at one time tended to hold that, if the defendant in a suit in chancery admitted by his answer the existence of the trust, he thereby supplied the statutory requisite, and thus became bound by his admission, even though there was no other written evidence of the trust.⁴ But it is now settled that he may have the benefit of the statute, if he choose to set it up in his answer. Being sued with regard to an alleged trust of which there is no sufficient declaration in writing, he may simply deny its existence by his answer, and at the trial of the case prove his denial by showing that the agreement was by parol; or he may follow the truth of the matter in his answer, by admitting that the agreement or settlement was made, and then successfully claiming that he is not bound by it, because there is no writing which complies with the requirement of the Statute of Frauds.⁵

The construction of the seventh section of the statute has been controlling upon that of the ninth; and it is accordingly

¹ *Leslie v. Leslie*, 53 N. J. Eq. 275, 281; *Keith v. Miller*, 174 Ill. 64; *Hill on Trustees*, 61; 1 *Perry on Trusts*, § 91.

² *Anding v. Davis*, 38 Miss. 574; *Davis v. Stambaugh*, 163 Ill. 557. And see *Kopp v. Gunther*, 95 Cal. 63; *Chase v. Stockett*, 72 Md. 235; 1 *Perry on Trusts*, §§ 91-94.

³ *Nab v. Nab*, 10 Mod. 404; *Cozine v. Graham*, 2 Paige (N. Y.), 177; *Maccubbin v. Cromwell*, 7 Gill & J. (Md.) 157, 164; *White v. Ross*, 160

Ill. 56; *McVay v. McVay*, 43 N. J. Eq. 47; *Warren v. Tyman*, 54 N. J. Eq. 402; *Patton v. Chamberlain*, 44 Mich. 5.

⁴ *Story's Eq. Plead.* §§ 765-768; *Hampton v. Spencer*, 2 Vern. 288.

⁵ *Dean v. Dean*, 9 N. J. Eq. 425; *Bank v. Root*, 3 Paige (N. Y.), 478; *Davis v. Stambaugh*, 163 Ill. 557; *Myers v. Myers*, 167 Ill. 52; *Billingslea v. Ward*, 33 Md. 48, 51; 1 *Perry on Trusts*, § 85.

held that the same requirements as to writing apply to an assignment of his interest by the *cestui que trust* as those which govern the evidencing of the trust in the first instance.¹

§ 316. **Language to be used in creating Express Trusts.** — The important requirement as to the use of language in the creation of an express trust is that the intent shall be made plain.² The words trust, trustee, etc., are not necessary.³ Neither are any technical words required. If the settler make his meaning clear, by the use of any form of expression, he accomplishes his purpose. But, when technical words are employed, they are to be given their technical meaning, unless the contrary clearly appears from the context, or unless it is one of the cases of executory trusts heretofore explained.⁴ The declaration of trust may be contained in another instrument than that by which the legal estate is conveyed to the trustee;⁵ or the document by which such declaration is made may consist of several distinct papers, with proper internal reference from the one which is signed to the others.⁶ But the conveyance of the legal estate and the creation of the trust (whether or not the latter is then manifested and proved by a writing) must be simultaneous, or at least in the same transaction. For, if an absolute legal estate be conveyed to one upon whom no fiduciary obligation is imposed at the time, the grantor can not subsequently interfere with the beneficial interest of the grantee by impressing a trust upon the property.⁷

When it is said that any words which clearly indicate an intent to create a trust may be effective in so doing, it must nevertheless be understood that the expression employed must indicate a final, definite purpose, and not merely an inchoate

¹ *Wright v. Wright*, 1 Ves. Sr. 409; *Brydges v. Brydges*, 3 Ves. 120; 1 Spence, Eq. Jur. 506; 2 Prest. Conv. 368.

² *Fisher v. Fields*, 10 Johns. Ch. (N. Y.) 495; *Carpenter v. Cushman*, 105 Mass. 417, 419; *Brown v. Combs*, 5 Dutch. (N. J.) 36; *Porter v. Bk. of Rutland*, 19 Vt. 410; *McAuley's Est.*, 184 Pa. St. 124; *Luco v. De Toro*, 91 Cal. 405.

³ *Shamless v. Welch*, 4 Dall. (U. S.) 279; *Packard v. Old Colony R. R.*, 168 Mass. 92, 96; *Fisher v. Fields*, 10 Johns.

Ch. (N. Y.) 495; *Seldon's Appeal*, 31 Conn. 548; *Freedley's Appeal*, 60 Pa. St. 344.

⁴ *Wright v. Pearson*, 1 Eden, 119, 125; § 309, *supra*.

⁵ *Wood v. Cox*, 2 Myl. & Cr. 684; *Inchiquin v. French*, 1 Cox, 1; *Smith v. Attersoll*, 1 Russ. 266.

⁶ See § 315, *supra*.

⁷ *Adlington v. Cann*, 3 Atk. 141, 145; *Crabb v. Crabb*, 1 Myl. & K. 511; *Ivory v. Burns*, 56 Pa. St. 300, 303; *Brown v. Brown*, 12 Md. 87; 1 Perry on Trusts, § 77.

design, or only an expectation.¹ A purpose or wish to give property, or settle it in trust, in the future, may be very clearly expressed without creating any trust. Thus, where one, at the time when he purchased a parcel of land, made and executed an instrument in which he declared that the purchase was "intended" for another person, it was held that no trust was thereby brought into being. The expression was nothing but the declaration of an incomplete design. The intent was not carried out.² A declaration of an intent to give is not an assertion that the owner holds in trust; but rather the contrary. To raise a trust, he must intend now to hold in trust, or now to convey on a trust to begin at once or in the future.³

There are two chief methods, by which expressions of completed intent to raise trusts may be made; namely, by direct words of *contract*, *command* or *declaration*, and by *precatory* words. These will be discussed in the order named. And in the former is included the subject of *voluntary* declarations of trusts.

Direct Words of Trust.

§ 317. **Trusts created by Direct Words of Contract, Command, or Declaration.** — By clear and explicit statement of intention, whatever may be the form of language employed, trusts may be brought into being, either by will, or by contract or declaration *inter vivos*. The cases of creation and attempted creation of them in this manner may be most readily and logically examined by considering, *first*, those in which the legal estate is fully transferred from the settler or creator of the trust to another person, *second*, those in which the settler makes himself trustee by an unequivocal declaration of trust, and *third*, those in which there is an imperfect or executory agreement or promise to transfer the property, or to hold it in future in trust for another. The last of these classes, including as it does the voluntary executory agreements to settle property in trust, has given rise to much divergence of decisions and opinions.

¹ *Cunningham v. Davenport*, 147 N. Y. 43; *Sheffield v. Parker*, 158 Mass. 330; *Providence Inst. for Savings v. Carpenter*, 18 R. I. 287; *Chaplin on Express Trusts and Powers*, §§ 52, 106.

² *Hays v. Quay*, 68 Pa. St. 263.

³ *Beaver v. Beaver*, 137 N. Y. 59; *Wadd v. Hazelton*, 137 N. Y. 215; *Young v. Young*, 80 N. Y. 422; *Girard Trust v. Mellor, Appellant*, 156 Pa. St. 579, 590.

§ 318. **First, Trusts Created on Transfer of Legal Estate.** — When the owner of property, complying with all the requisites prescribed by common law and statutes, transfers the legal estate therein to another person to hold in trust for a third, the trust will be recognized and enforced by a court of equity, whether or not the grantor or settler received any consideration. The fact of the *completed transfer* is sufficient. The instrument being duly executed and delivered and nothing further remaining to be done by the grantor, deviser, or other settler, the trust is created.¹ The only material questions, which can thereafter arise, are such as relate to the nature and operation of the trust thus created. And such questions must be decided by application of the ordinary rules for the interpretation and construction of the language employed. When the legal estate is such that it can not be effectually transferred, as when it is a mere possibility or reversionary interest, the same *principle* applies, according to the weight of the more recent important authorities; and the trust is created when the owner has done *all that he can do* under the circumstances of the case, by perfecting the transaction of assigning as far as the law permits.² So, if the assignor have only the equitable estate, the legal interest being vested in another who is holding it for him, if he fully assign his own interest in equity for the benefit of a designated beneficiary, a sub-trust is thereby brought into existence in favor of such beneficiary.³ But, in all instances in which the legal estate is not transferred, but the existence of the trust is intended to rest upon the passing over of some other interest, the author of the intended trust must have made as complete an assignment as possible under the circumstances of the case.⁴ Where, for example, the document might have assigned in equity the so-called settler's rever-

¹ *Massey v. Huntington*, 118 Ill. 80; *Boardman v. Willard*, 73 Iowa, 20; *Westlake v. Wheat*, 43 Hun (N. Y.), 77; *1 Perry on Trusts*, § 99.

² *Kekewich v. Manning*, 1 DeG. M. & G. 176, 187; *Fortescue v. Barnett*, 3 Myl. & K. 36; *Roberts v. Lloyd*, 2 Beav. 376; *Gilbert v. Overton*, 33 L. J. Ch. 683; *Appeal of Elliott's Ex'rs*, 50 Pa. St. 75; *1 Perry on Trusts*, § 101; *1 Lewin on Trusts*, 58. See earlier cases *contra*, *Edwards v. Jones*, 1 Myl. & Cr.

226; *Meek v. Hattlewell*, 1 Hare, 464; *Beech v. Keep*, 18 Beav. 285; *1 Perry on Trusts*, § 101.

³ *Collinson v. Patrick*, 2 Keen, 123; *Tierney v. Wood*, 19 Beav. 330.

⁴ *In re Earl of Lucan*, L. R. 45 Ch. Div. 470; *Kekewich v. Manning*, 1 DeG. M. & G. 176; *Wilcocks v. Hannington*, 5 Ir. Eq. (N. C.) 38, 45; *Morgan v. Malleson*, 10 Eq. 475; *Girard Trust Co. v. Mellor*, 156 Pa. St. 579; *Hill on Trustees*, 140, 141.

sionary interest, but it only purported to create a charge thereon, no trust was thereby brought into existence.¹

§ 319. **Second, Trust created by Settler making Himself Trustee.** — When the settler takes his own property and makes himself trustee of it by an unequivocal declaration of trust, it is equally well settled that an express trust is thereby brought into being, whether or not he receives any consideration for his act.² Such a transaction involves no transfer of the legal estate, except the theoretical transfer which the owner makes from himself as an individual to himself as a trustee. But the matter for careful inquiry here is as to the passing over of the equitable estate. Was an unequivocal declaration made and *delivered* for that purpose? The intent of the declarant, in such a case, is again to be ascertained from a proper interpretation and construction of his language. The question as to the *delivery* of the document, however, is often perplexing.³ For example, A makes and duly executes a deed, in which he declares that he will thereafter hold a designated lot of land in trust for B. How and to whom must it be delivered, in order to become operative? "In no case," says the Supreme Court of New York, "has it ever been held as yet that a party may, by transferring his property from one pocket to another, make himself trustee. In every case where a trust has been established, the party creating it has placed the evidence thereof in the custody of another, and has thereby shown that it was intended to be a completed act."⁴ This is certainly a clear statement of the safer rule of practice — that the declarant must deliver the document, either to the *cestui que trust* himself, or to some third party for him. But, as is suggested by a recent careful writer, it would seem to be a sufficient delivery for him to indicate, in any other clear manner, his intention to make the instrument become operative in his own hands, as by acknowledging it before a notary public, or by placing and retaining it among other valuable and frequently in-

¹ *In re* Earl of Lucan, L. R. 45 Ch. Div. 470; *Bispham's Prin. Eq.* § 67.

² *Donaldson v. Donaldson*, Kay, 711; *Milroy v. Lord*, 4 DeG. F. & J. 264; *Ellison v. Ellison*, 6 Ves. 656, 662; *Culbertson v. Witbeck*, 127 U. S. 326; *Stone v. Hackett*, 12 Gray (Mass.), 227; *James v. Falk*, 50 N. J. Eq. 468; *Lane v. Ewing*, 31 Mo. 75; 1 *Perry on Trusts*, § 98.

³ If the instrument be not properly delivered it can not be upheld as a declaration of trust. *Wadd v. Hazelton*, 137 N. Y. 215; *Smith's Est.*, 144 Pa. St. 428; *Soulard's Est.*, 141 Mo. 642; *Wylie v. Charlton*, 43 Neb. 840; *Roberts v. Mullinder*, 94 Ga. 493.

⁴ *Govin v. De Miranda*, 76 Hun (N. Y.), 414, 419.

spected papers, or by stating to witnesses that he had delivered it from himself as an individual to himself as trustee, etc.¹ And there is abundant authority to the effect that he need not part with possession of the instrument.²

§ 320. **Third, Executory Agreement or Promise to settle Property in Trust.** — In the third class of cases — those in which there is an imperfect or executory agreement or promise to transfer the property or to hold it in future in trust for another — the element of consideration becomes controlling. For when the promise rests upon a valuable consideration a contract arises, which will be enforced by the courts; but when the declaration or promise is purely voluntary — not based on any valuable consideration — and rests *in fieri*, there is ordinarily nothing to move a court of either law or equity to grant relief. Therefore, where the promise or stipulation is executory or incomplete, the two essentially different groups of cases are those in which valuable considerations exist and those in which such consideration is wanting. The distinction here found, as it is applied to trusts or other equitable interests, is the same as that between gifts and executory contracts at common law. The gift must be perfected by delivery of possession of the subject-matter; while the contract, based on a promise to pay value, can be enforced though no such delivery has been made.³

The instances are, of course, plentiful in which the owner of property has entered into an agreement, in consideration of money or money's worth paid or promised, or of a marriage to be consummated,⁴ to hold such property in trust for another, or to convey it to him in trust for a third party. And in no such a case has a court of equity refused, as between the parties themselves, to declare and enforce a trust

¹ Chaplin on Express Trusts and Powers, § 78. See *Govin v. De Miranda*, 140 N. Y. 474; *Martin v. Funk*, 75 N. Y. 134, 142; *Wadd v. Hazelton*, 137 N. Y. 215.

² *Clavering v. Clavering*, 2 Vern. 473; *Souverye v. Arden*, 1 Johns. Ch. (N. Y.) 240, 256; *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Adams v. Adams*, 21 Wall. (U. S.) 185; *Johnson v. Smith*, 1 Ves. Sr. 314.

³ 2 Blackst. Com. p. *441. See *Sherk v. Endress*, 3 W. & S. (Pa.) 255; *Zimmerman v. Streeper*, 75 Pa. St. 147;

Kulp v. March, 181 Pa. St. 627; *Westlake v. Wheat*, 43 Hun (N. Y.), 77.

⁴ In speaking of marriage as a valuable consideration, the distinction must always be borne in mind between an existing married relation and the contracting of a marriage as an inducement to some other act or promise. The latter is a valuable consideration, but not the former. *Johnston v. Spicer*, 107 N. Y. 185; *De Barante v. Gott*, 6 Barb. (N. Y.) 492; *Chilvers v. Race*, 194 Ill. 71; 18 Amer. Law Rev. 379.

in favor of the promisee or designated beneficiary, upon application being properly made to it for that purpose.¹ Between the parties to the agreement, equitable interests flowing therefrom are as fully protected as are legal rights. But, as will more fully appear hereafter, creditors of the promisor and persons having in the property equitable interests, of which the other parties to the contract have notice, may sometimes prevent the carrying out of such an attempted trust. When an intended trust is not perfectly created, but the incomplete or defective instrument is delivered for value actually advanced or promised, the court will enforce the trust, if enough appear from the document to show what are its terms and who are the parties to be benefited.² "In such cases, effect is given to the *consideration* to carry out the intention of the parties, though informally expressed."³ It is hardly necessary to add that the court will not move to carry out a trust, even where a valuable consideration appears, if its terms and conditions can not be ascertained with sufficient clearness, or the *cestuis que trustent* are not definitely indicated or known.⁴

After some vacillation by the courts, it is now settled in most jurisdictions that an imperfect or executory conveyance or declaration of trust, which is also purely voluntary, will never be aided or enforced in equity.⁵ "I take the distinction to be," said Lord Eldon, "that if you want the assistance of the court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; . . . but if the party has completely transferred stock, etc., though it is voluntary, yet, the legal conveyance being effectually made, the equitable in-

¹ Baldwin v. Humphrey, 44 N. Y. 609; Young v. Young, 80 N. Y. 422, 437; Merrill v. Peaslee, 146 Mass. 460; Whitehouse v. Whitehouse, 90 Me. 468; Benschoter v. Green, 60 Md. 327; Taylor v. Pownal, 10 Leigh (Va.), 172, 183; 1 Perry on Trusts, § 95. The consideration must be legal and the contract otherwise valid. Merrill v. Peaslee, 146 Mass. 460.

² Livingston v. Livingston, 2 Johns. Ch. (N. Y.) 537; Huntley v. Huntley, 8 Ired. Eq. (N. C.) 250; Young v. Young, 80 N. Y. 422, 437.

³ 1 Perry on Trusts, § 95.

⁴ Dillaye v. Greenough, 45 N. Y. 438; Ham v. Van Orden, 84 N. Y. 257; Ownes v. Ownes, 23 N. J. Eq. 60.

⁵ Matter of James, 146 N. Y. 78; Martin v. Funk, 75 N. Y. 134; Minturn v. Seymour, 4 Johns. Ch. (N. Y.) 497, 498; Hayes v. Kershaw, 1 Sand. Ch. (N. Y.) 258; Acker v. Phoenix, 4 Paige (N. Y.) 305; Matthews v. Hoagland, 48 N. J. Eq. 455; Moore v. Moore, 43 L. J. Ch. 617, 623; 1 Perry on Trusts, § 97; Pomeroy, Eq. Jur. § 1148; Story, Eq. Jur. § 987.

terest will be enforced by this court.”¹ That is, in a voluntary declaration or settlement in trust, if everything is not done, nothing is done. The court will not compel one, who has merely promised without consideration that he would give or settle property in trust, to go on and perform that promise against his will. To do so would be to take his property from him by force and *give* it to another.² And, when a person has promised to settle property by his will in favor of mere volunteers, but has died without making such a settlement, equity will afford no assistance to the promisees against the heirs or personal representatives of the deceased promisor.³ So, although the technical rule of law is that a seal imports a consideration, yet it is settled in England that the mere fact that an executory promise to convey property in trust is under seal will not alter the rule as here stated, if as a matter of fact there be no consideration for the promise.⁴ And, while in some of the early cases in this country it was said that the courts would not execute a voluntary executory agreement “*unless it is under seal*,” it is nevertheless safe to say that, at the present time, the rule of America in this regard is in harmony with that of England.⁵

There has been considerable discussion of the question whether or not a contract or promise founded on the meritorious consideration of blood, or on that of an existing relation of marriage, is voluntary, so as to come within the above-stated rule of equity. While Sugden was Lord Chancellor of Ireland, he decided, in the case of *Ellis v. Nimmo*, that a blood relationship was sufficient to move a court of equity to enforce an executory trust.⁶ He subsequently allowed this decision to be overruled in England.⁷ And the doctrine is now firmly estab-

¹ *Ellison v. Ellison*, 6 Ves. 656; *Young v. Young*, 80 N. Y. 422; *Wadd v. Hazelton*, 137 N. Y. 215.

² *Young v. Young*, 80 N. Y. 422, 437.

³ *Warriner v. Rogers*, L. R. 16 Eq. 340; *Morgan v. Malleson*, L. R. 10 Eq. 475.

⁴ *Hale v. Lamb*, 2 Eden, 292, 294; *Evelyn v. Templar*, 2 Bro. Ch. 148; *Meek v. Kettlewell*, 1 Hare, 464; *Dillin v. Coppin*, 4 Myl. & Cr. 647; *Dening v. Ware*, 22 Beav. 184.

⁵ So little attention is now paid by our courts to mere formalities, and the formality of a seal has lost so much of

its importance because of statutes, that it would be a construction out of harmony with the present tendency of equity tribunals, which should carry out a voluntary executory agreement simply because it was under seal. But see 1 Perry on Trusts, § 111; *Dennison v. Goehring*, 7 Barr (Pa.), 175; *Caldwell v. Williams*, 1 Bailey Eq. (S. C.) 175; *Mahan v. Mahan*, 7 B. Mon. (Ky.) 579; *Leeper v. Taylor*, 111 Mo. 312.

⁶ *Lloyd & Gould*, 333.

⁷ *Moore v. Crofton*, 3 Jones & La T. 438, 442. But, even in this case, he still expressed his belief in the soundness of *Ellis v. Nimmo*.

lished in that country that not even in favor of a wife or child will the court carry out an executory agreement resting on no valuable consideration; and this is true, whether the attempt be made to have it enforced against the settler himself, or against his heirs or devisees, or against other volunteers who claim under an executed agreement with him.¹ While the authorities in the United States are not entirely harmonious upon this point, yet the strongly prevailing view is in favor of the English rule.² Thus, in New York, the Court of Appeals has recently said: "The general principle is established that in no case whatever will courts of equity interfere in favor of mere volunteers, whether it be upon a voluntary contract or a settlement, however meritorious may be the consideration, and although they stand in the relation of a wife or child."³ In a few of the states, however, such as New Jersey,⁴ South Carolina,⁵ Missouri,⁶ and Kentucky,⁷ the decisions are the other way. Yet, even in the few jurisdictions where a wife or child is thus favored, the rule is said to be confined to those two relationships; and it will not extend its advantages to more remote relatives of the voluntary promissor, such as brothers, sisters, parents, or grandchildren,⁸ nor to illegitimate children.⁹

§ 321. **Revocation of Trusts, which have been created by Direct Words.** — Much diversity of opinion has arisen as to the revocability of a voluntary trust by the settler, after it has once been completely declared or settled. When a valuable consideration exists, no such question can practically arise, because in such a case, a contract having been brought into existence

¹ *Moore v. Crofton*, 3 Jones & La T. 438, 442; *Price v. Price*, 14 Beav. 598; *Holloway v. Headington*, 8 Sim. 324; *Jefferys v. Jefferys*, 1 Cr. & Phil. 138; *Evelyn v. Templar*, 2 Bro. Ch. 148; *Dillon v. Coppin*, 4 Myl. & Cr. 647.

² *Matter of James*, 146 N. Y. 78, 93; *Wadd v. Hazelton*, 137 N. Y. 215; *Campbell's Est.* 7 Pa. St. 100; *Waterman v. Morgan*, 114 Ind. 237; *McHugh v. O'Connor*, 91 Ala. 243. See 1 Perry on Trusts, § 109; Pom. Eq. Jur. § 1148.

³ *Matter of James*, 146 N. Y. 78, 93.

⁴ *Tarbox v. Grant*, 56 N. J. Eq. 199; *Landon v. Hutton*, 50 N. J. Eq. 500. These cases contain valuable discussions of the question.

⁵ *Caldwell v. Williams*, 1 Bailey Eq. (S. C.) 175.

⁶ *Leeper v. Taylor*, 111 Mo. 312.

⁷ *Bright v. Bright*, 8 B. Mon. (Ky.) 194, 197; *Mahan v. Mahan*, 7 B. Mon. (Ky.) 579; *McIntire v. Hughes*, 4 Bibb (Ky.), 186. But in most of the cases, in Missouri, South Carolina, and Kentucky, stress has also been laid on the existence of a seal as indicating a consideration.

⁸ *Downing v. Townsend*, Amb. 592; *Buford's Heirs v. McKee*, 1 Dana (Ky.), 107; *Tarbox v. Grant*, 56 N. J. Eq. 199; *Hayes v. Kershaw*, 1 Sand. Ch. (N. Y.) 258.

⁹ *Fursaker v. Robinson*, Pr. Ch. 475. See *Bunn v. Winthrop*, 1 Johns. Ch. (N. Y.) 329; *Matter of James*, 146 N. Y. 78.

by the meeting of at least two minds, it can not be done away with by the act of one of them alone. When a debtor has made a voluntary assignment of his property in trust for his creditors, a valuable consideration, although a past one, is supplied by the existence of the debts; and, if the creditors have assented to such transfer thereby making it a contract, it has become irrevocable by the assignor.¹ In this country, from the fact of the assignment alone, and in the absence of statutory regulation the assent of the creditors is presumed (unless the contrary is clearly proved²) and thus a contract is held to exist.³ In England it is a question of the intent of the assignor to make a completed assignment. If the language used and circumstances of the case show that he intended the transfer to be final, or if it be proved that the creditors expressly or tacitly consented to the assignment, a contract emerges, irrevocable by the assignor.⁴

When, on the other hand, an *executed voluntary* settlement in trust has been made, may the donor revoke it at pleasure, or in order to reserve that privilege must he have inserted in the settlement an express power of revocation? The correct answer to this much mooted question appears to depend on the intention and motives which gave rise to the settlement. The absence of an express power of revocation, in other words, is not conclusive, but only makes a *prima facie* case of a trust irrevocable by its maker.⁵ When, from all the other circumstances of the case, it does not appear that there was any intent to make an irrevocable settlement, and there was apparently

¹ *Siggers v. Evans*, 32 Eng. L. & Eq. 139; *Walwyn v. Coutts*, 3 Sim. 14, 3 Mer. 707.

² See *Gibson v. Rees*, 50 Ill. 383.

³ *Nicoll v. Mumford*, 4 Johns. Ch. (N. Y.) 522; *Cunningham v. Freeborn*, 11 Wend. (N. Y.) 240; *Pingree v. Comstock*, 18 Pick. (Mass.) 46; *Fellows v. Greenleaf*, 43 N. H. 421; *Read v. Robinson*, 6 Watts & S. (Pa.) 329; *Tenant v. Stoney*, 1 Rich. Eq. (S. C.) 223; *England v. Reynolds*, 38 Ala. 370, 1 Lead. Cas. Eq. 327. This presumption may be rebutted by the fact that the assignment is not for the benefit of the creditors, or is in an objectionable or unusual form. See 2 Perry on Trusts, § 593.

⁴ *Walwyn v. Coutts*, 3 Sim. 14, 3

Mer. 707; *Harland v. Binks*, 15 Q. B. 713; *Acton v. Woodgate*, 2 Myl. & K. 492, 495; *New v. Hunting* (1897), 1 Q. B. 607, 615; *Synnott v. Simpson*, 5 H. L. Cas. 121, 133. It was said in *Garrard v. Lord Lauderdale*, 3 Sim. 1, that, even after the assignment had been communicated to the creditors, it might be revoked by the debtor. But this is manifestly not now the law of England. See also *Bill v. Cureton*, 2 Myl. & K. 503, 511; *Johns v. James*, L. R. 8 Ch. Div. 744.

⁵ See this clearly explained in *Garnsey v. Mundy*, 24 N. J. Eq. 243, 13 Amer. Law Reg. (N. S.) 345, with note; also in 1 Perry on Trusts, § 104 and note.

no motive for making such a binding arrangement, the court may permit the grantor to annul the trust, although no right to do so was expressly reserved.¹ Whereas, if there existed a manifest design to dispose permanently and definitely of the property in trust, or if there appear a clear and sufficient reason for doing so, such, for example, as to provide for an indigent family or to guard against the effects of extravagance or intemperance on the part of the settler, the arrangement will be declared complete and irrevocable, unless there exist an express power of revocation.² In the former case, the absence of both motive and intent to make the trust permanent is *prima facie* evidence of mistake in not reserving the power to revoke; while in the latter no such evidence exists. (a)

Precatory Words.

§ 322. **Trusts created by Precatory Words — Precatory Trusts.** — Precatory trusts are those created by words of prayer, entreaty, request, hope, desire, expectation, and the like, and not of direct command or explicit declaration. They occur almost exclusively in wills, because testators, in preparing their last wills and testaments, are apt to have in mind the times and circumstances under which the documents will be read and put into operation, and to soften their language, accordingly, from that of harsh command to that of request or expectation. Such forms of trusts *may* occur, however, and

(a) In New York, when the settler reserves for his own benefit an absolute power to revoke the trust, he remains the absolute owner of the property, so far as the rights of his creditors and purchasers are concerned. Real Prop. Law (L. 1896 ch. 547), § 125; *Conkling v. Davies*, 14 Abb. N. C. 499, 501; *Von Hesse v. MacKaye*, 136 N. Y. 114; *Van Cott v. Prentice*, 104 N. Y. 45.

¹ *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Doran v. McConlogue*, 150 Pa. St. 98, 115; *Barnard v. Gantz*, 140 N. Y. 249, 255; *Farleigh v. Cadmann*, 159 N. Y. 169, 172; *In re Thurston*, 154 Mass. 596; *Cooke v. Lamotte*, 15 Beav. 234; *Brannin v. Shirley*, 91 Ky. 450; *Ewing v. Wilson*, 19 Lawy. Rep. Ann. 767. But see *Howard v. Howard*, 60 Vt. 362; *Sargent v. Baldwin*, 60 Vt. 17.

² *Tucker v. Bennett*, L. R. 38 Ch.

Div. 1, 17; *Von Hesse v. MacKaye*, 136 N. Y. 114; *Conkling v. Davies*, 14 Abb. N. C. (N. Y.) 499; *Culrose v. Gibbons*, 130 N. Y. 447, 452; *Wilson v. Anderson*, 186 Pa. St. 531; *Reidy v. Small*, 154 Pa. St. 505; *Neal v. Black*, 177 Pa. St. 83; *New v. Hunting* (1897), 2 Q. B. 19; The maker of the trust may also expressly reserve a power to modify the same. *Locke v. F. L. & T. Co.*, 140 N. Y. 146.

are occasionally found, in other instruments.¹ The principle, upon which courts proceed in spelling out trusts from such language, is that, while the form of expression is modified and softened by the testator, his meaning is the same as if he used more explicit and unequivocal words in ordering and directing the disposition of his property.² In every day life, commands of the most emphatic nature are frequently issued in the form of requests. And it is natural that testators should often adopt the same method of giving instructions which are intended to be imperative. The finding by equity of precatory trusts in such instruments is, therefore, simply an application of the fundamental rule of construction of wills — the rule which requires the *intention* of the testator to be ascertained and carried out — whereby forms of express trusts are shown to be created by the testamentary language employed.³ For example, a testator gives property to his wife, with a “request” that out of its proceeds she shall maintain his niece, who has been brought up by him and taught to depend upon him for support; and a court of equity finds, from such language and circumstances, that a trust was *meant* to be impressed upon the property in the hands of the donee.⁴

§ 323. **Intent the Chief Exponent of Precatory Trusts.** — Some writers have laboriously collected long lists of expressions, which have been held in some cases to have created precatory trusts, and other lists of those which have been decided to be insufficient for that purpose.⁵ But, in the light of the most recent adjudications, these are of but little assistance. The question presented, in each case, is that of the interpretation and construction of a will, which is probably different in some respects from every other will. And this requires that the entire document shall be studied and the intention of the testator ascertained, as expressed by the words he has used, according to their ordinary and natural meaning, but possibly

¹ See *Liddard v. Liddard*, 28 Beav. 266; *Verzier v. Convard*, 75 Conn. 1; *Bispham's Prin. Eq.* § 76.

² *Knight v. Boughton*, 11 Cl. & Fin. 513, 548; *Knight v. Knight*, 3 Beav. 148, 173; *Mason v. Limbury*, cited in *Vernon v. Vernon*, Amb. 4; *Hill on Trustees* (4th Amer. ed.), p. 73.

³ *Eaton v. Watts*, L. R. 4 Eq. 151, 155;

Young v. Martin, 2 You. & Coll. 582; *Clay v. Wood*, 153 N. Y. 134; *Aldrich v. Aldrich*, 172 Mass. 101; *Eberhardt v. Perolin*, 49 N. J. Eq. 570; *Boyle v. Boyle*, 152 Pa. St. 108.

⁴ *Collister v. Fassitt*, 163 N. Y. 281.

⁵ See 1 *Perry on Trusts*, §§ 112, 113; 1 *Ames, Cases on Trusts*, p. 82 *et seq.*

modified by the context and his situation and circumstances at the time when he used them.¹

As a rule or principle of construction subsidiary to that which requires the testamentary *intent* to be sought, it was at one time held by the English courts, in conformity to the old Roman law, that precatory words in a will were to be taken as *prima facie* imperative, and would raise a trust, unless a contrary intent appeared from the context or circumstances.² But this doctrine has been abolished by recent decisions in England; and it is now firmly established there that such expressions alone do not import a command.³ In the case of *Hill v. Hill*,⁴ decided in 1897, a summary of the rule of construction, which is now controlling, is thus stated by Lord Esher, M.R.: "Words of request in their ordinary meaning convey a mere request, and do not convey a legal obligation of any kind either at law or in equity. But in any particular case there may be circumstances which would oblige the court to say that such words have a meaning beyond their ordinary meaning and import a legal obligation." This is a clear expression of a principle for which some of the English judges had long contended,⁵ but which may be said to have been first thoroughly crystallized into law in the leading case of *In re Adams & Kensington Vestry*.⁶

In the United States, the best decisions of recent years are fully in harmony with the present English rule.⁷ In the Su-

¹ *Colton v. Colton*, 127 U. S. 300, 312; *Clay v. Wood*, 153 N. Y. 134; *Aldrich v. Aldrich*, 172 Mass. 101; *Dexter v. Evans*, 63 Conn. 58; *Eberhardt v. Perolin*, 49 N. J. Eq. 570; *Boyle v. Boyle*, 152 Pa. St. 108; *Murphy v. Carlin*, 113 Mo. 112; 1 Ames, Cases on Trusts, 96, 97; 1 Jarman on Wills, p. *356.

² *Knight v. Knight*, 3 Beav. 148, 173; *Knight v. Boughton*, 11 Cl. & Fin. 513; *Hill on Trustees* (4th Amer. ed.), 73. "The wish of a testator," it was said, "like the request of a sovereign, is equivalent to a command."

³ *In re Hamilton* (1895), 2 Ch. 370; *Hill v. Hill* (1897), 1 Q. B. 483; *Booth v. Booth* (1894), 2 Ch. 282; *In re Diggle*, L. R. 39 Ch. Div. 253; *In re Adams & Kensington Vestry*, L. R. 27 Ch. Div. 394; *Adams v. Loddell*, 25

L. R. Ir. 311; *Atkinson v. Atkinson*, 62 L. T. 735.

⁴ (1897), 1 Q. B. 483.

⁵ See *Lambe v. Eames*, L. R. 6 Ch. App. 597; *Sale v. Moore*, 1 Sim. 534, 540; *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321; *Reeves v. Baker*, 18 Beav. 372; *In re Hutchinson & Tenant*, L. R. 8 Ch. Div. 540; *Briggs v. Penny*, 3 MacN. & G. 546; *McCormick v. Grogan*, L. R. 4 H. L. 82; *Parnall v. Parnall*, L. R. 9 Ch. Div. 96.

⁶ L. R. 27 Ch. Div. 394; *Brett's Lead. Cas. Eq. 13*.

⁷ *Colton v. Colton*, 127 U. S. 300; *Collister v. Fassitt*, 163 N. Y. 281; *Clay v. Wood*, 153 N. Y. 134; *In re Gardner*, 140 N. Y. 122; *Matter of Ingersoll*, 131 N. Y. 573; *Phillips v. Phillips*, 112 N. Y. 197; *Brown v. Perry*, 51 N. Y. App. Div. 11, 12; *Aldrich v. Aldrich*,

preme Court of the United States, the subject was exhaustively discussed, in 1888, in the case of *Colton v. Colton*.¹ The testator there gave a large estate to his wife, and said in connection with the gift: "I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best." It was held that a trust was thereby created. But the decision was not based alone on the words above quoted, but rather on the conclusion of the court that, in view of the largeness of the estate and the added fact, which was proved, that the testator's mother and sister had only a meagre income of their own, he could not have *intended* to confide solely in his wife's affection for his relatives to determine what she should do for them, but must have *meant* that his language should carry a command.² The same principle of construction has been uniformly recognized in Pennsylvania and Connecticut.³ And in New York,⁴ New Jersey,⁵ Massachusetts,⁶ Indiana,⁷ Iowa,⁸ Missouri,⁹ Virginia,¹⁰ South Carolina,¹¹ and Maryland,¹² such is

172 Mass. 101; *Durant v. Smith*, 159 Mass. 229; *Boyle v. Boyle*, 152 Pa. St. 108; *Good v. Fichthorn*, 144 Pa. St. 287; *Eberhardt v. Perolin*, 49 N. J. Eq. 570; *Dexter v. Evans*, 63 Conn. 58; *Pratt v. Trustees*, 88 Md. 610; *Orth v. Orth*, 145 Ind. 184; *Stivers v. Gardner*, 88 Iowa, 307; *Murphy v. Carlin*, 113 Mo. 112; *Sale v. Thornberry*, 86 Ky. 266; *Arnold v. Arnold*, 41 S. C. 291; *Harrison v. Harrison*, 44 Amer. Dec. (Va.) 365.

¹ 127 U. S. 300.

² It is intimated, in this case, that, if the testator, in giving the same estate to his wife, had made a similar request in favor of their children, there would have been no trust; but the wife would have taken the property absolutely, as in the English case of *In re Adams & Kensington Vestry*. It could then have been safely assumed that the testator *meant* to rely on the mother's natural affection for her children, and therefore did not *intend* to give her a command by the precatory words employed. But such an intent could not be assumed as to *his* blood relatives who were not hers. This distinction well illustrates the nice discrimination with which the *intention*

of a testator is sought, when he has made use of precatory words.

³ *Pennock's Est.*, 20 Pa. St. 268, 280; *Paisley's Appeal*, 70 Pa. St. 153; *Boyle v. Boyle*, 152 Pa. St. 108; *Murphy's Est.*, 184 Pa. St. 310, 314; *Gilbert v. Chapin*, 19 Conn. 342; *Dexter v. Evans*, 63 Conn. 58.

⁴ *Clay v. Wood*, 153 N. Y. 134; *Collister v. Fassitt*, 163 N. Y. 281; *Matter of Ingersoll*, 131 N. Y. 573; *Matter of Keleman*, 126 N. Y. 73; *Phillips v. Phillips*, 112 N. Y. 197; *Lawrence v. Cooke*, 104 N. Y. 632; *Willets v. Willets*, 103 N. Y. 650, 656; *Foose v. Whitmore*, 82 N. Y. 405; *Brown v. Perry*, 51 N. Y. App. Div. 11, 12.

⁵ *Eberhardt v. Perolin*, 49 N. J. Eq. 570.

⁶ *Aldrich v. Aldrich*, 172 Mass. 101; *Durant v. Smith*, 159 Mass. 229; *Bacon v. Ransom*, 139 Mass. 117.

⁷ *Orth v. Orth*, 145 Ind. 184.

⁸ *Stivers v. Gardner*, 88 Iowa, 307.

⁹ *Murphy v. Carlin*, 113 Mo. 112.

¹⁰ *Harrison v. Harrison*, 44 Amer. Dec. (Va.) 365.

¹¹ *Arnold v. Arnold*, 41 S. C. 291; *Lesesne v. Witte*, 5 S. C. 450.

¹² *Pratt v. Trustees*, 88 Md. 610; *Nunn v. O'Brien*, 83 Md. 198.

undoubtedly the present rule. In a number of the American states, however, such as Maine,¹ Alabama,² and Florida,³ the old Roman rule has been early adopted and never modified. In summary for this country, then, it may be said that, in some of the states, such as those last mentioned, precatory words are words of technical import and without more imply *prima facie* an intent to create a trust; while in the United States Supreme Court and the courts of most of the states, such as those first above mentioned, they are words, not of technical, but of common parlance, and do not raise a trust, unless from the context and the situation and circumstances of the testator it is to be fairly concluded that such was his intention.

The *intention* of the testator, then, the "pole star" for the construction of wills, is the one thing commonly sought for, in determining whether or not a precatory trust has been created. His wish, when clearly ascertained, is to be taken as a command.⁴ But, by the weight of authority, especially as expressed by the most recent decisions on both sides of the Atlantic, a design to raise such a trust shall not be found *prima facie* from the mere use of precatory words, but must be spelled out of the entire document read in the light of the circumstances of the case.⁵ There are several subordinate principles, which are commonly employed in this connection in the effort to ascertain intention. Chief among these is the requirement that there must be certainty as to both the objects and the subject-matter of the trust; that is, the parties who are to take as beneficiaries must be definitely indicated, and the property which they are to take must be clearly specified.⁶

§ 324. **Certainty of Beneficiaries as indicative of Precatory Trusts.** — As to the first of these requirements, it will be hereafter fully explained that certainty in the beneficiary is one of the prime requisites of every private trust.⁷ But if a trust be created by direct, technical words, thereby making it plain be-

¹ *Cole v. Littlefield*, 35 Me. 439.

² *McRee's Adm'rs v. Means*, 34 Ala. 349.

³ *Lines v. Darden*, 5 Fla. 51.

⁴ Perhaps the three typical cases in America may be said to be *Colton v. Colton*, 127 U. S. 300; *Clay v. Wood*, 153 N. Y. 134; and *Aldrich v. Aldrich*, 172 Mass. 101. And all of these are in harmony with the English rule.

⁵ Cases cited above, especially *Hill*

v. Hill (1897), 1 Q. B. 483; *In re Adams & Kensington Vestry*, L. R. 27 Ch. Div. 394; *Colton v. Colton*, 127 U. S. 300; *Clay v. Wood*, 153 N. Y. 134; *Aldrich v. Aldrich*, 172 Mass. 101.

⁶ *Stead v. Mellor*, L. R. 5 Ch. Div. 225, 227; *Briggs v. Penny*, 3 MacN. & G. 546; *Harding v. Glyn*, 1 Atk. 469; 2 Lead. Cas. Eq. 1833, and notes.

⁷ § 327, *infra*.

yond question that the trustee is not to take beneficially, and the *cestui que trust* be not clearly pointed out, or, because of his death or inability to take, the primary objects of the settlement fail, the property is held for the benefit of the settler, or, if he be dead, of his heirs or personal representatives; and a resulting trust is thus brought into existence.¹ Whereas, in case of uncertainty of the beneficiary indicated by precatory words, the courts will more readily conclude that no trust whatever was intended, and permit the donee to take the property freed from all fiduciary obligation.² Thus, suppose one lot of land is devised to A, "in trust nevertheless for such persons as are hereafter in this will designated," and no beneficiaries are clearly pointed out by the will; and another lot is devised to A, "hoping and requesting, however, that he will use as much of the income as is necessary for the support of such of his relatives as may be hereinafter named," and no such relatives are definitely named in the will. If these testamentary statements be all the evidence available as to the intended dispositions of the two lots, A will take the former in trust for the heirs of the testator, but will own the latter absolutely for his own benefit. In the one case, it is clear that A is not to take beneficially, and so he is required to hold the property in trust; in the other, the want of certainty is *evidence* indicating that the testator did not really intend to create any trust.³ The distinction thus pointed out is the most important practical one between a precatory trust and a trust made by direct words of command or declaration. In the former, in case of its failure, the donee of the legal estate is the more apt to acquire the property for his own benefit. But, of course, if the creator of

¹ Resulting trusts are such as arise by implication of law, in favor of the grantor or his heirs, or the heirs of a testator, when property has been conveyed to a trustee with the *manifest intention* that he shall not hold it beneficially, and the purpose for which he is to hold is not fully expressed, or for some reason can not be carried out. Such trusts are implied to carry out the presumed intent of the settler. See discussion of them hereafter, Ch. XXII. *infra*.

² *Morice v. Bishop of Durham*, 10 Ves. 521, 536; *Meredith v. Heneage*, 1 Sim. 542; *Harland v. Trigg*, 1 Bro. C. C. 142; *Hood v. Oglander*, 34 L. J. Ch.

528; *Mussoorie Bank v. Raynor*, L. R. 7 App. Cas. 321; *Giles v. Anslow*, 128 Ill. 187; *Harper v. Phelps*, 21 Conn. 256.

³ Cases cited in last note. In the first of those cases, the Lord Chancellor said: "Wherever the subject to be administered is trust property, and the objects for whose benefit it is to be administered are to be found in a will not expressly creating a trust, the indefinite nature and quantum of the subject, and the indefinite nature of the object are always used by the court as *evidence* that the mind of the testator was not to create a trust."

a trust make it clear, even by the use of precatory words, that he wishes the trustee to hold the property for some one other than himself, *and not to have any beneficial interest therein*, this design will in some way be carried out by the court, even though the primary purpose of the settlement fail, for want of certainty, or for other cause.¹

§ 325. **Certainty of Subject-Matter as indicative of Precatory Trusts.** — Another matter for inquiry, in this connection, to aid in ascertaining the settler's *intent*, is the certainty with which the property or subject-matter is pointed out. When the identity or amount of this is left at all in doubt, and precatory language is employed, the conclusion most naturally and commonly drawn, in the absence of other evidence to the contrary, is that no trust was meant to be created.² Cases of this sort arise, and no trust comes into existence, where the donee is authorized to select the particular piece of land, or the amount of it, and it is fair to conclude from the context that such choice is left entirely to his discretion;³ or where he is to use up as much of it as he may need or desire and any "surplus," or "residue," is requested to be held for others, or to be divided among them.⁴

§ 326. **Other Tests as to whether or not Precatory Trusts exist.** — A few other principles, upon which courts have laid stress as helping to determine whether or not a precatory trust was designed, may be briefly mentioned. Thus, when the gift is in the first instance absolute and apparently for the donee's own benefit, it will not be cut down to a trust by subsequent precatory words in the will; and especially is this true when other provisions of the will intervene between the gift and the precatory language relating thereto.⁵ So the courts will not

¹ *Ingram v. Fraley*, 29 Ga. 553; *Hill on Trustees* (4th Amer. ed.), 110, and notes; *Hawkins on Wills*, 160.

² *Knight v. Boughton*, 11 Cl. & Fin. 513; *Cournan v. Harrison*, 10 Hare, 234; *Durant v. Smith*, 159 Mass. 229; *Coulson v. Alpaugh*, 163 Ill. 298; *Nunn v. O'Brien*, 83 Md. 198.

³ *Williams v. Williams*, 1 Sim. n. s. 358; *Reeves v. Baker*, 18 Beav. 372; *Hood v. Oglander*, 34 Beav. 513; *Foose v. Whitmore*, 82 N. Y. 405; *Matter of Keleman*, 126 N. Y. 73; *Wyman v. Woodbury*, 86 Hun (N. Y.), 277, 282; *Gilbert v. Chapin*, 19 Conn. 342.

⁴ *Knight v. Boughton*, 11 Cl. & Fin. 513; *Clancarty v. Clancarty*, 31 L. R. Ir. 530, 549; *Pennock's Est.*, 20 Pa. St. 268; *Willeys v. Willeys*, 103 N. Y. 650, 656; *Durant v. Smith*, 159 Mass. 229; *Nunn v. O'Brien*, 83 Md. 198; *Coulson v. Alpaugh*, 163 Ill. 298; 1 *Perry on Trusts*, § 114, and note, and § 116.

⁵ *Webb v. Wools*, 2 Sim. n. s. 267; *Bardswell v. Bardswell*, 9 Sim. 319; *Wilde v. Smith*, 2 Dem. (N. Y.) 93; *Lawrence v. Cooke*, 104 N. Y. 632; *Clarke v. Leupp*, 88 N. Y. 228; *Brown v. Perry*, 51 N. Y. App. Div. 11, 12;

raise such a trust for a purpose, the carrying out of which they can not compel; as where a devise was to the testator's wife, with a request that out of the proceeds of the property she should support his sister, as long as the two women would live together, the court declared it could not undertake to make them live together, and therefore would not hold that there was any trust.¹ Again, if the words used indicate merely a *purpose* or *motive* in making the gift, rather than a direction as to its use, there will not be any trust. Thus a gift of property to a person, "to purchase a ring," or "to enable him to maintain the children," does not bring into being a trust of any kind.²

There must be, as prerequisites to the existence of a precatory trust, a reasonably clear intent that definitely described property shall be held for the benefit of *cestuis que trustent* who are pointed out with common certainty.

§ 327. **Requisites of Express Trusts generally.** — It has been said that "Three things must concur to raise a trust, — sufficient words to create it, a definite subject, and a certain or ascertained object."³ That is, there must be a sufficient declaration of the trust, in terms either precatory or directly mandatory, the subject-matter must be clearly indicated, and the object or beneficiary must be definitely pointed out. These things must coexist, in order that a trust may come into being. When it has once been created and exists as an interest in real property, its essential features are seen to be the same as those which were heretofore enumerated as belonging to a use; namely, a trustee in being, a *cestui que trust* in being and ascertained, or so described as to be readily ascertainable, and a determined subject-matter *in esse*, to which the trust interest is attached.⁴

The word "*certain*" is very important, in regard to all of these requisites. While uncertainty as to the *individuals* who are to be the beneficiaries is one of the elements of a charitable

Van Duyne v. Van Duyne, 14 N. J. Eq. 397; Second, etc. Church v. Desbrow, 52 Pa. St. 219; 1 Perry on Trusts, § 112, and note.

¹ Graves v. Graves, 13 Ir. Ch. 182; Hood v. Oglander, 34 Beav. 513; Harper v. Phelps, 21 Conn. 256. See Phillips v. Phillips, 112 N. Y. 197, 204.

² Apreece v. Apreece, 1 Ves. & Bea. 364; Benson v. Whittam, 5 Sim. 22; Burke v. Valentine, 52 Barb. (N. Y.)

412; Burt v. Herron, 66 Pa. St. 400; Barrett v. Marsh, 126 Mass. 213; 1 Perry on Trusts, § 119.

³ Knight v. Boughton, 11 Cl. & Fin. 513; Cruwys v. Colman, 9 Ves. 319, 323.

⁴ Phelps' Executor v. Pond, 23 N. Y. 69, 77; Rose v. Hatch, 125 N. Y. 427, 431; Greene v. Greene, 125 N. Y. 506, 510; Sherwood v. Amer. Bible Soc., 4 Abb. Ct. App. Dec. (N. Y.) 227.

trust,¹ yet if in any other form of express trust, as to any of its requisites, or if in a charitable trust as to any requisite except the objects, there be such uncertainty that the court can not surely know who or what is meant, the settlement attempted, or apparently attempted, can not be carried into effect. Either the entire scheme will fail, and there will be no trust at all,² or, if the legal estate pass to one who clearly ought not to hold it for his own advantage, some form of implied trust will arise, either to comply with the presumed intent of the parties or to work out justice regardless of such intent.³ It has already been shown that trusts are more apt to exist by implication, or to *result*, when explicit mandatory statements are used by the settler but uncertainty arises as to the objects to be benefited, than in cases of like ambiguity where the expressions used to create the trusts are precatory.⁴ When doubt springs from the latter source, it frequently causes the court to hold, in its quest for the *intent*, that there is not enough evidence to raise a trust—or rather that the doubt is such as in itself to be *evidence* against the existence of any trust at all—and that the donee takes the property absolutely for his own benefit.⁵

It is a rule which has no exception that, if a trust be once properly created, equity will not allow it to fail for want of a trustee.⁶ When no trustee is properly named, or one who is duly appointed dies, is removed, or becomes incapacitated, the court either ascertains or appoints another, or regards itself as such and executes the trust.⁷ Therefore, a trust rarely fails on account of any difficulty as to the trustee. There is ordinarily a trustee of some kind *in esse*. But, *when the coming of the trust into existence depends on the appointment of a trustee*, as is true of some forms of charitable trusts hereafter explained,⁸ then the failure to name one, or an attempted

¹ See § 308, *supra*, and §§ 345, 346, *infra*.

² *Campbell v. Brown*, 129 Mass. 23; *Hill on Trustees* (4th Amer. ed.), 73, 74.

³ See § 310, *supra*, and § 351, *infra*.

⁴ § 324, *supra*; *Morice v. Bishop of Durham*, 10 Ves. 521, 536; *Bispham's Prin. Eq.* §§ 75, 76.

⁵ § 324, *supra*.

⁶ *Co. Lit.* 290 b, 113 a; *Dodkin v. Brunt*, L. R. 6 Eq. 580; *Bundy v. Bundy*, 28 N. Y. 410; *McCartee v. Orphan Asy. Soc.*, 9 Cow. (N. Y.) 437; *Crocheron v.*

Jaques, 3 Edw. Ch. (N. Y.) 207; *Story, Eq. Jur.* §§ 98, 976.

⁷ *Bennet v. Davis*, 2 P. Wms. 316; *Cross v. U. S. Trust Co.*, 131 N. Y. 330, 350; *Kirk v. Kirk*, 137 N. Y. 510, 515; *Cushney v. Henry*, 4 Paige (N. Y.), 345; *King v. Donnelly*, 5 Paige (N. Y.), 46; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Platt v. Vattier*, 9 Pet. (U. S.) 405; *Kerr v. Day*, 14 Pa. St. 114; *Treat's Appeal*, 30 Conn. 113.

⁸ § 346, *infra*.

nomination by words so ambiguous that the court can not ascertain certainly who is meant, will defeat the entire scheme.¹ The court will not let an existing trust terminate for want of a trustee; nor will it bring into being a trust that would otherwise not exist, by creating a trustee, or identifying one from loose, ambiguous, or uncertain expressions.

Any kind of valuable property may be the subject-matter of a trust.² Real property of every sort is that dealt with by the trusts here discussed. The simple requirement is that it shall be definitely pointed out, so that it can be ascertained with certainty by the court. And when this is done, even though the land itself is not within the jurisdiction of the court, a trust thereof can be taken cognizance of and administered, if the court have jurisdiction over the parties. "Equity acts *in personam*."³ And therefore, in the absence of statutory restriction, if it have the parties properly before it, it may administer trusts and fiduciary matters as to property which is situated in a state or country outside of its own jurisdiction.⁴

Kinds of Express Trusts and Trust Interests.

§ 328. **Express Trusts, Active and Passive.** — The distinction between (a) active (or special) and (b) passive (or simple) trusts has been already pointed out.⁵ When the trustee has certain duties to perform, such, for example, as to manage the property for the benefit of other persons, which renders it necessary that the legal estate shall remain in him, the trust is active. Otherwise it is passive; that is, the trustee is merely the receptacle of the legal title; the *cestui que trust* has both the *jus habendi*, or the right to possess and enjoy the property, and the *jus disponendi*, or the right, as he may direct, to compel the trustee to convey the legal estate.⁶ This division

¹ Last preceding note; Grimes v. Harmon, 35 Ind. 198; 2 Perry on Trusts, § 713.

² 1 Perry on Trusts, § 67.

³ The jurisdiction of the Court of Chancery was acquired originally against the person; and an attachment against the *person* has always been its ordinary method of proceeding. Great Falls Mfg. Co. v. Worster, 23 N. H. 462; Hart v. Sansom, 110 U. S. 151, 154.

⁴ Penn v. Lord Baltimore, 1 Ves. Sr. 444, 2 Lead. Cas. Eq. 767; Vaughan v. Barclay, 6 Whart. (Pa.) 392; Mitchell v. Bunch, 2 Paige (N. Y.), 606; Chase v. Chase, 2 Allen (Mass.), 101; Lindley v. O'Reilly, 50 N. J. L. 636; Clad v. Paist, 181 Pa. St. 148; 1 Perry on Trusts, §§ 71, 72.

⁵ § 307, *supra*.

⁶ Mills v. Johnston (1894), 3 Ch. 204; McCune v. Baker, 155 Pa. St. 503; 1 Lewin on Trusts, p. * 18.

of trusts into those that are active and those that are passive assumes its chief importance as a subdivision of express trusts, because implied trusts are uniformly passive.

§ 329. (a) **Active Express Trusts.** — The purposes for which active express trusts may exist at common law are many and varied, and are discussed hereafter. Such trusts simply need to be mentioned here as a class. And the material and often difficult question is next in order, when and under what conditions do trusts, which are created as active ones, cease to exist because of the fact that they become passive by a change of circumstances and are then executed by the Statute of Uses? If, for example, land be devised to A as an active trustee to manage and pay the net income to B during his life and then to convey the land to C, D, and E, when if ever will the legal estate depart from A (although he fail to convey it), and vest in the beneficiaries, C, D, and E? Before the discussion of such questions, however, a few words are required as to trusts which are passive in their inception.

§ 330. (b) **Passive Express Trusts — or Uses — When Executed.** — A passive express trust is simply and only the old use with a new name — the legal estate is vested in one who has nothing to do but to hold it, for another who has all the management and benefit of the property.¹ When a trust is thus expressly created in the first instance as passive, and there is in its inception no resort to the principle in *Tyrrel's Case* — no making of it in the form of a use upon a use — in the absence of direct, modern statutory prohibition, it will ordinarily be at once executed by the Statute of Uses.² The mere employment of the word “trust,” instead of “use,” will make no difference. It is the *use* such as existed in the times of and before the Statute of Uses; and is dealt with as such. In many of the United States, as New York, Indiana, Delaware, Massachusetts, Pennsylvania, Maine, New Hampshire, Vermont, and Virginia, the rule in *Tyrrel's Case* has been entirely abrogated, either by positive statute or judicial determination.³ (a) Indeed, it has been doubted by high

(a) For the New York statute abolishing the rule of *Tyrrel's Case*, see note (a) to § 331, *infra*.

¹ §§ 303, 304, *supra*.

² *Austen v. Taylor*, 1 Eden, 361; *Wendt v. Walsh*, 164 N. Y. 154; 1 Lewin on Trusts, p. *209.

³ N. Y. Real Prop. Law (L. 1896, ch. 547), §§ 72, 73; *Downing v. Marshall*, 23 N. Y. 366, 379; *Townshend v. Frommer*, 125 N. Y. 446, 456; *Wendt*

authority whether that rule is in force at all in this country.¹ And the general American principle may be stated to be that, whenever the legal estate is expressly given to a trustee, to whom no active duties are assigned, it immediately goes past him and vests in the *cestui que trust* for whose benefit the settlement was ultimately intended. In Missouri, however, and possibly in a few other states, Tyrrel's Case has been adhered to; and there, if a passive express trust be made in the *form* of a use upon a use, as to A in trust for B in trust for C, the legal estate will not be carried further than to the first-named beneficiary — in the example given, to B — and he will hold as a passive trustee for the other — for C.²

§ 331. **Effects of Active Express Trusts becoming Passive.** — The more difficult question, as above stated,³ is usually presented when a trust which has been once active becomes passive, or when by any means the trustee once active becomes the holder of a mere dry legal estate. Does the trust then cease and the legal estate vest immediately in the beneficiary? It does so in New York and in the few states, such as Wisconsin and Michigan, which have followed New York's advanced form of legislation upon this subject.⁴ In those states a passive express trust can not exist; for, as soon as a trust becomes of that nature, the equitable estate of the ultimate beneficiary is merged in the legal estate which passes to him.⁵ The same position was at one time held by the courts of Pennsylvania, without the aid of any statute.⁶ But they subsequently abandoned that extreme ground, and placed themselves again in line with the English courts and those of the majority of the states of this country.⁷

v. Walsh, 164 N. Y. 154; Ind. Rev. St. (1843) ch. 28; Del. Rev. St. (1829) p. 89, § 1; *Thatcher v. Omans*, 3 Pick. (Mass.) 521, 528; *Tucker's Appeal*, 75 Pa. St. 354; Greenl. Cruise, Dig. tit. xii. ch. 1, § 4, note.

¹ Greenl. Cruise, Dig. tit. xii. ch. 1 § 4, note.

² *Guest v. Farley*, 19 Mo. 147. And see *Croxall v. Shererd*, 5 Wall. (U. S.) 268, 282; *Price v. Sisson*, 13 N. J. Eq. 168, 173; *Jackson v. Cary*, 16 Johns. Ch. (N. Y.) 302.

³ § 329, *supra*.

⁴ N. Y. Real Prop. Law (L. 1896, ch. 547), §§ 72, 73; *Townshend v. Frommer*, 125 N. Y. 446, 456; *Hopkins v.*

Kent, 145 N. Y. 363; *Wendt v. Walsh*, 164 N. Y. 154; Wis. Rev. St. (1858) p. 529; *Goodrick v. Milwaukee*, 24 Wis. 422, 429; *Backhaus v. Backhaus*, 70 Wis. 518; 2 Mich. Comp. L. (1857) p. 824; *Ready v. Kearsley*, 14 Mich. 215, 228. See also *Murphey v. Cook*, 75 N. W. Rep. (S. D.) 387.

⁵ *Ibid*.

⁶ *Kuhn v. Newman*, 26 Pa. St. 227; *Bush's Appeal*, 33 Pa. St. 85; *Nagee's Appeal*, 33 Pa. St. 89.

⁷ *Barnett's Appeal*, 46 Pa. St. 392; *Bacon's Appeal*, 57 Pa. St. 504; *Tucker's Appeal*, 75 Pa. St. 354; *Ogden's Appeal*, 70 Pa. St. 501.

These latter tribunals likewise hold that the trust is executed as soon as it becomes wholly passive, when the only reason for the existence of the trustee in the first place was that he might hold the property for the purpose of actively performing some prescribed duty in reference thereto, and no ultimate conveyance or transfer is expressly or impliedly directed.¹ Thus, where land was conveyed to the grantor's wife, in trust to hold and manage for the benefit of their children until the youngest child should become twenty-one years of age, it was held that at the majority of such child the trust terminated and the legal estate vested absolutely in all the beneficiaries.² But when the failure of the statute to execute the trust in the first instance is not due entirely to the active character of the trust, — as, for example, when the trustee is directly ordered to make a conveyance of the legal title after his work of managing for a period is accomplished, — then it is held by the courts of England and most of our states that the fact alone that the trust has ceased to be active does not cause it to be executed by the Statute of Uses.³ In such cases, however, after his active labors are at an end, it is generally the duty of the trustee, upon demand of the *cestui que trust*, to convey the legal title to the latter, or to such person or persons as he shall appoint.⁴ And, a sufficient reason therefore thus appearing, after a great lapse of time and long-continued possession by the equitable owner, and in favor of a just title, equity will presume that the trustee has performed his duty by making such a conveyance.⁵ Thus, where the trustee is expressly ordered to convey upon the happening of a specified event, as when a minor becomes of age, and the beneficiary has been exclusively enjoying the property for a number of years after that time — in one case only about four years — the court presumes a conveyance, though there may be nothing to lead it to suppose that one was ever actually made.⁶ So,

¹ 1 Perry on Trusts, §§ 349–351.

² *Sherman v. Dodge*, 28 Vt. 26, 30; *Leonard's Lessee v. Diamond*, 31 Md. 536, 541; *Hill on Trustees* (4th Amer. ed.), 316; 1 Perry on Trusts, § 351.

³ *England v. Slade*, 4 T. R. 682; *Obert v. Bordine*, 20 N. J. L. 394; *Welles v. Castles*, 3 Gray (Mass.), 323; *Hooper v. Felgner*, 80 Md. 262, 271; *Aikin v. Smith*, 1 Sneed (Tenn.), 304; *Liptrot v. Holmes*, 1 Kelley (Ga.),

381. And see *Hopkins v. Kent*, 145 N. Y. 363; 1 Perry on Trusts, §§ 351–355.

⁴ *Dunn v. Wheeler*, 80 Mo. 238.

⁵ *England v. Slade*, 4 T. R. 682; *Angier v. Stannard*, 3 Myl. & K. 566, 571; *Langley v. Sneyd*, 1 Sim. & St. 45.

⁶ *England v. Slade*, 4 T. R. 682; *Wilson v. Allen*, 1 Jac. & W. 591, 611; *Hillary v. Waller*, 12 Ves. 239; *Doe v. Sybourn*, 7 T. R. 2; *Marr v. Gilliam*, 1 Cold. (Tenn.) 488.

where land was deeded to trustees, for the purpose of having them partition it and transfer separate pieces to the individual grantors, it was presumed, after long occupation of distinct parcels by the latter, that the trustees had duly made the contemplated conveyances.¹ The three requisites to such a presumption are: *first*, that it shall be supported by some sufficient reason — and long and exclusive possession by the beneficiary, when aided by any other slight circumstances, is one of the best and most common reasons; *second*, that it was the duty of the trustee to make the conveyance; and *third*, that the presumption is in favor of, and not against, a just and proper title.² One can not have the benefit of such a presumption for gaining an unfair or inequitable advantage over an adverse claimant.³

It need hardly be added that, while the trust remains active, in whole or in part, the statute will not execute it, and the courts will ordinarily refuse to presume or order a conveyance from the trustee. Yet, even if some of the purposes of the trust have not been accomplished, or the trust may not have run its full prescribed course, if the *cestuis que trustent* are all in being and under no legal disability, the court, with their consent, may order the trust to be terminated and the legal estate transferred to the rightful owner or owners.⁴ This can not be done, however, in derogation of the wish or intent of the settler of the trust.⁵

The rules above stated, by which the English and most of the American courts determine whether or not a trust that has become passive is to be held to have terminated, or a conveyance of the legal estate to the beneficiaries is to be presumed, are necessarily somewhat vague and indefinite. The time involved in raising such presumptions of conveyances is not necessarily nor usually the same as that of the Statute of Limitations. Sometimes it is shorter, sometimes longer, according as there are or are not other important facts to aid in raising

¹ Jackson v. Moore, 13 Johns. Ch. (N. Y.) 513, a case decided under the New York law before the present form of statute on this matter was adopted, — before Jan. 1, 1830.

² 1 Perry on Trusts, §§ 351-355.

³ Doe v. Wrighte, 2 Barn. & Al. 710; Doe v. Cook, 6 Bing. 174, 179; 1 Perry on Trusts, § 355.

⁴ Bowditch v. Andrew, 8 Allen

(Mass.), 339; Culbertson's Appeal, 76 Pa. St. 145, 148; Cuthbert v. Chauvet, 136 N. Y. 326; Perry on Trusts, §§ 274, 922.

⁵ Hogan v. Kavanogh, 138 N. Y. 417; Cuthbert v. Chauvet, 136 N. Y. 326; Lent v. Howard, 89 N. Y. 169; Douglas v. Cruger, 80 N. Y. 15; Chaplin on Express Trusts and Powers, § 526.

the presumption.¹ All the circumstances of each case are carefully examined; and, in the light of these and by the application of the rules above stated, the trusts are declared to have terminated when such conclusions are just and equitable and aid in the quieting and perfecting of titles. A statutory rule, like that of New York, which instantly terminates an express trust when it ceases to be active, is much more definite and satisfactory. (a)

(a) The New York statute, which is now Real Prop. Law (L. 1896, ch. 547), §§ 70-73, is as follows:—

“§ 70. Every estate which is now” (Jan. 1, 1830) “held as a use, executed under any former statute of the state, is confirmed as a legal estate.”

“§ 71. Uses and trusts concerning real property, except as authorized or modified by this article, have been abolished; every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter.”

“§ 72. Every person, who, by virtue of any grant, assignment, or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest; but this section does not divest the estate of the trustee in any trust existing on the first day of January, eighteen hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.”

“§ 73. Every disposition of real property, whether by deed or by devise, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and if made to any person to the use of, or in trust for another, no estate or interest, legal or equitable, vests in the trustee. But neither this section nor the preceding section of this article shall extend to the trusts arising, or resulting by implication of law, nor prevent or affect the creation of such express trusts as are authorized and defined in this chapter.”

No express trusts, except such as are active, are “authorized and defined” in the chapter which contains these sections, or in any other law of New York. The sections here quoted are the present form of the same statute in substance, which went into operation as a part of the New York Revised Statutes, Jan. 1, 1830 (1 R. S. 727, §§ 45-50). See Fowler's R. P. Law, pp. 232-243.

The results of these enactments are that (1) no passive express trust

¹ 1 Perry on Trusts, § 349. In some instances this time is regulated by special statutes of limitation. Thus, in New York, a trust for the benefit of creditors, except where a different period is fixed by the

trust instrument, or is specially prescribed by law, “shall cease at the expiration of twenty-five years from the time when the trust was created.” See last paragraph to note (a), p. 465, *infra*.

§ 332. **Powers in Trust.** — In order that a trust may exist, the trustee must have the *legal estate* in the property. If there be no legal estate and title for a trustee, there can be no trust.¹ Thus, if land be devised to A to hold and manage for the benefit of B, the legal estate vests in A; and, if anything subsequently occur by which that interest is taken to B, the trust

can exist in New York, but an attempt to create one, which is otherwise legal, vests the legal estate at once in the person who is designated as ultimate beneficiary, *Hopkins v. Kent*, 145 N. Y. 363; *Syracuse Sav. Bk. v. Holden*, 105 N. Y. 415, 418; *Wendt v. Walsh*, 164 N. Y. 154; *Seidelbach v. Knaggs*, 44 N. Y. App. Div. 169; *Ring v. McCoun*, 10 N. Y. 268; and (2) when a trust once active ceases to be so and becomes passive, the legal estate passes instantly to the beneficiary, or person entitled thereto, without any conveyance by the trustee; and this is true whether or not the trustee was ordered by the trust instrument to make a conveyance, *Ring v. McCoun*, 10 N. Y. 268; *Matter of Brown*, 154 N. Y. 313; *Matter of Tompkins*, 154 N. Y. 634. And see *Matter of Baer*, 147 N. Y. 348. If, for example, property be devised to A, in trust to manage and pay the net rents and profits to B, and on B's death to divide and convey the *corpus* among B's children, as soon as B is dead the children then living have the legal estate absolutely vested in them, without the necessity for any conveyance by A. *Matter of Brown*, 154 N. Y. 313; *Matter of Crane*, 164 N. Y. 71; *Paget v. Melcher*, 156 N. Y. 399. And it seems to be clear in such a case that, since no conveyance by the trustee is necessary to perfect the title, he can not be compelled to convey. *Ring v. McCoun*, 10 N. Y. 268. But see *Anderson v. Mather*, 44 N. Y. 249; *King v. Whaley*, 59 Barb. 71.

These statutes do not vest an estate in the proposed beneficiary, however, if he be incapable of taking a direct grant or devise of the legal title, as, e.g., if he be an alien who could not so take directly. *Beekman v. Bonson*, 23 N. Y. 298, 316. So these statutes do not apply to take the legal estate from the trustee, when he himself has a beneficial interest in the property, either alone or with others. *King v. Townshend*, 141 N. Y. 358, 364; *New York Dry Dock Co. v. Stillman*, 30 N. Y. 174.

In connection with the matter of the termination of a New York express trust by virtue of statute, § 90 of the real property law (L. 1896, ch. 547) is also to be noted. It is as follows: "Where an estate or interest in real property has heretofore vested or shall hereafter vest in the assignee or other trustee for the benefit of creditors, it shall cease at the expiration of twenty-five years from the time when the trust was created, except where a different limitation is contained in the instrument creating the trust, or is especially prescribed by law. The estate or interest remaining in the trustee or trustees shall thereon revert to the assignor, his heirs, devisee, or assignee, as if the trust had not been created." *Kip v. Hirsh*, 103 N. Y. 565, 572; *Hoag v. Hoag*, 35 N. Y. 460; *New York Steam Co. v. Stern*, 46 Hun, 206.

¹ *Govin v. De Miranda*, 140 N. Y. 474, N. Y. 146; *Requisites of Trusts*, § 327, 477; *Locke v. F. L. & Y. Co.*, 140 *supra*.

then instantly terminates.¹ But it frequently happens that a *power* to dispose of property is given to one, to whom no estate or interest is transferred; as, for example, when realty is conveyed to A for his life and B is authorized and empowered to dispose of it after A's death. B has no estate in the land, but only a *power* or authority to dispose of or otherwise deal with it. The donee, or owner of such a right, *may* also have an estate in the property, either for his own benefit or as trustee for another, and so may own the two as separate and distinct things.² This is illustrated by a conveyance of land to A, to hold during his life, either for himself or in trust for others, with power in him to dispose of it by will at his death.³ But the important distinction is that, as donee of a power he does not *have to own* the legal estate, although he *may* own both; whereas to be trustee he *must have* the legal estate. This is not the proper place for the complete discussion of powers over real property. They are most readily explained hereafter, in connection with future and executory interests in realty. But such powers as partake of the nature of trusts—those which place fiduciary obligations upon the donees, and are consequently called trust powers, or powers in trust—should be briefly noticed here, after our examination of the forms of express trusts.

§ 333. **Executing, or carrying out the Requirements of, Powers in Trust.**—In the early leading case of *Brown v. Higgs*,⁴ Lord Eldon said: "There are not only a mere trust and a mere power, but there is also known to this court a power which the party to whom it is given is entrusted and required to execute; and with regard to that species of power the court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed upon him does not discharge it, the court will to a certain extent discharge the duty in his own room and place." That is, a power in trust, in its essential nature, places upon the donee thereof a *duty* to execute it, and thereby to dispose of property, in favor of some person or persons other than himself. An illustration is found in a devise of land to the testator's son, during his

¹ *Wade v. Paget*, 1 Bro. Ch. 363; *James v. Morey*, 2 Cow. (N. Y.) 246; *Nicholson v. Halsey*, 1 Johns. Ch. (N. Y.) 417, 422; *Wills v. Cooper*, 1 Dutch. (N. J.) 137; *Donalds v. Plumb*, 8 Conn. 446, 453; 1 *Perry on Trusts*, § 347.

² *Belmont v. O'Brien*, 12 N. Y. 394, 404; *Fincke v. Fincke*, 53 N. Y. 528; *Miller v. Wright*, 109 N. Y. 194.

³ *Smith v. Floyd*, 140 N. Y. 337.

⁴ 8 Ves. 570, 5 Ves. 495.

life, "with the right and privilege of disposing of the same by will or devise to his children, if any he should have."¹ Unless the creator of such a power himself leaves it discretionary with the donee to execute it or not as he may choose, or, in other words, unless the duty is expressly created as an imperfect and unenforceable obligation, equity will compel the donee to perform it, if possible;² or, if he be dead or can not be reached, the court itself will execute the trust power.³ And when the latter course is pursued, if no special scheme of distribution be outlined by the donor, the court follows its maxim, that "equality is equity," and divides the property equally among the designated beneficiaries.⁴

In the last analysis, then, a power in trust involves a form of express fiduciary obligation similar to that of an express trust. The same degree of certainty as to the subject-matter and beneficiaries is required, and equity usually enforces the performance of the obligations alike in both cases.⁵ But the fact is to be again emphasized that the donee, *as such*, of a power in trust never has the legal estate, while there can be no trust, technically so called, without a legal estate vested in a trustee. (a)

The purposes for which powers in trust may exist are practically unrestricted, except by local statute, and by the requirement that their execution shall not violate any rule of law or public policy.

(a) The New York system of trusts and powers is such that many dispositions of property, which at common law would cause trusts to exist, produce mere powers in trust. See this explained in the note on New York express trusts, at the end of this chapter.

¹ *Smith v. Floyd*, 140 N. Y. 337; *Salisbury v. Denton*, 3 Kay & J. 529; *Glover v. Condell*, 163 Ill. 566.

² *In re Kirwan's Trusts*, L. R. 25 Ch. Div. 373; *In re Burrage*, 62 L. T. 752; *Towler v. Towler*, 142 N. Y. 371; *Mut. L. Ins. Co. v. Everett*, 40 N. J. Eq. 345; *Osborne v. Gordon*, 86 Wis. 92; *Dick v. Harby*, 48 S. C. 516; *McHan v. Ordway*, 82 Ala. 463.

³ *Ibid.*; 1 *Perry on Trusts*, § 255.

⁴ *Doyle v. Atty.-Gen.*, 2 Eq. Cas. Ab. 195; *Izod v. Izod*, 32 Beav. 242; *Salisbury v. Denton*, 3 Kay & J. 529; *Rorke v. Abraham* (1895), 1 I. R. 334;

Glover v. Condell, 163 Ill. 566. But when a different practical scheme of distribution is set forth by the donor, the court will follow his wishes as far as possible. *Gower v. Mainwaring*, 2 Ves. Sr. 87; *Maberly v. Torton*, 14 Ves. 499; *Bull v. Bull*, 8 Conn. 47; 1 *Perry on Trusts*, § 255.

⁵ *In re Weeke's Settlement* (1897), 1 Ch. 289; *In re Eddowes*, 1 Drew. & Sm. 395; *Tilden v. Green*, 130 N. Y. 29; *Towler v. Towler*, 142 N. Y. 371; *Mut. L. Ins. Co. v. Everett*, 40 N. J. Eq. 345; *Osborne v. Gordon*, 86 Wis. 92.

Specific Kinds of Express Trusts.

§ 334. **Purposes for which Express Trusts may exist.** — At common law, the only practical restriction upon the purposes for which express trusts can be created and exist is that they shall not be of an illegal character.¹ Illustrations of purposes for which they are very commonly made are; to sell, and from the proceeds to pay creditors of the settler; to sell, mortgage, or lease to pay legacies or charges; to manage, receive the net income and pay it over to designated persons or apply it to their maintenance and support; to receive the net income and accumulate it for a specified object; to sell and pay the proceeds to the settler; to receive the income and raise therefrom a jointure or marriage portion; to convey to specified persons; to partition; to mortgage or lease, and out of the proceeds to pay the settler's debts; to hold for the sole and separate use of a married woman; to hold and manage for the benefit of a charity, etc. In a few states, of which New York is prominent, the number of purposes for which express trusts in real property are allowed has been materially reduced by statute, and powers in trust have been substituted for those forms which have been abolished.² But this change has not been made with regard to personal property, (a) nor in England and most of the United States with regard to realty.

Of the purposes above enumerated, the trusts for creditors are very important, as comprising assignments and transfers of property in bankruptcy proceedings and the ordinary insolvent and general assignments under state statutes. By the conveyance of the land to the trustee or assignee in bankruptcy or

(a) The five purposes for which express trusts in real property are now permitted in New York are explained in the note at the end of this chapter. There has been no attempt made, however, to define or restrict the purposes for which express trusts in personalty may be lawfully created *Tabernacle Church v. Fifth Avenue Church*, 60 N. Y. App. Div. 327, 334; *Russell v. Hilton*, 80 N. Y. App. Div. 178, 187. See *Mills v. Husson*, 140 N. Y. 99.

¹ This is true as to both realty and personalty, unless changed by statute. *Matter of Carpenter*, 131 N. Y. 86; *Hirsh v. Auer*, 146 N. Y. 13; *Hagerty v. Hagerty*, 9 Hun (N. Y.), 175; *Tritt v. Crotzer*, 13 Pa. St. 451; 1 *Perry on Trusts*, § 21.

² See note on New York express trusts, at the end of this chapter; *Backhaus v. Backhaus*, 70 Wis. 518; *Ready v. Kearsley*, 14 Mich. 215, 228; *Murphy v. Cook*, 11 S. D. 47.

insolvency, he acquires it as an active trustee to dispose of according to the statute under which he is acting and to distribute the net proceeds ratably among the creditors of the insolvent or bankrupt.¹ (a)

Trusts to pay legacies, or charges on land such as mortgages, etc., and those to manage the property and to receive and disburse or accumulate income are very common and necessary forms, which are retained even under such restrictive statutes as those of New York.² A few words as to one of the trusts for receiving and disbursing income — the so-called spendthrift trust — are added in the following section. Trusts for the sole and separate use of married women are not now as common as they were before modern legislation had given to *femes covert* the general ownership of their real property, and the complete control of and power over it which they now enjoy in most places. But a brief summary of this kind of express trusts is needed in a subsequent section. Trusts for the benefit of charity have been briefly described already, and their distinctive characteristics stated.³ They require further discussion in this chapter, as an important species of active express trusts.

§ 335. **Spendthrift Trusts.** — The settler of a trust to receive and disburse income sometimes attempts to prevent the interest of the *cestui que trust* from being aliened by him or reached by his creditors. These arrangements, which have been styled “spendthrift trusts,” have caused much discussion and contrariety of opinion and decision as to how far such objects can be legally accomplished.

It is absolutely settled in England that neither the alienability of such an equitable estate or interest, nor its availability for the debts of its owner, except when she is a married woman, can in any manner be prevented or taken away. A condition precedent that the provision shall not vest for the beneficiary until his debts are paid, or a condition subsequent

(a) The “General Assignment” Act of New York, the operation of which is, of course, largely superseded by the National Bankruptcy Law now in force, was passed in 1877 (L. 1877, ch. 466), and is now found in N. Y. R. S. (9th ed.) p. 2429. Insolvent Assignments, Code Civ. Pro. §§ 2149–2187. See Gerard, Titles R. E. (4th ed.) ch. 31, 32.

¹ The statutes in full upon these subjects should be consulted. See the National Bankruptcy Act of July 1, 1898; N. J. L. 1899, ch. 54; 1 Stim. Amer. Stat. L. part iv., “Insolvency.”

² N. Y. Real Prop. Law (L. 1896, ch. 547), § 76.

³ § 308, *supra*.

that the trust interest shall be divested from him if he become insolvent or indebted and shall then pass over to another, is there valid; and thus the creditors of the intended *cestui que trust* may be prevented from ever reaching the property, because of his never acquiring it or its being taken from him to another. But the principle is unassailable that he can not take and *retain* the property exempt from the rights of his creditors or divested of his own power of disposal.¹

Uniformly in this country, also, conditions preventing the proposed beneficiary from acquiring and keeping the trust estate while he is insolvent, or passing it over to another if he become so, are sustained.² And likewise the general rule throughout the United States, wherever the matter is not affected by statute, is the same as that of England, — the *cestui que trust* can not hold the property for his own enjoyment freed from the duty of applying it or having it applied to the payment of his debts and obligations.³ But in a few of the states, of which Massachusetts, Maine, Connecticut, and Virginia are examples, and in the Federal Courts, even in the absence of any statutory regulation, property may be settled in trust by one person for the payment of income to another as beneficiary for his life or for a shorter period, so that his creditors can not reach it and he himself can not alien it by way of anticipation. The principle on which this result is based is that the rule of public policy, which requires a man's property to be subject to the payment of his debts, does not go to the extent of giving a creditor a right to complain because his debtor receives a gift from a donor, who, in exercising his absolute right of disposition of the property, has chosen to keep it out of the reach of the creditors of the donee.⁴ In some of the American states, such as New York and New Jersey, this matter is regulated by statute; the favorite form of the enactment being to the effect that where property is given to a trustee by one person to pay the income to another for life, a judgment creditor of the latter may maintain an action in equity to recover the surplus income

¹ *Brandon v. Robinson*, 18 Ves. 429; *Dumpor's Case*, 1 Sm. L. C. 119, note; *Wms. R. P.* p. *87.

² *Ibid.*; *Nichols v. Eaton*, 91 U. S. 716; *Hallett v. Thompson*, 5 Paige (N. Y.), 583; *Easterly v. Keney*, 36 Conn. 22; *Taylor v. Harwell*, 65 Ala. 1.

³ *Ibid.*; *Warner v. Rice*, 66 Md. 436; *Perry on Trusts*, §§ 386 a, 827 a.

⁴ *Foster v. Foster*, 133 Mass. 179; *Broadway Nat. Bk. v. Adams*, 133 Mass. 170; *Wanner v. Snyder*, 177 Pa. St. 208; *Seitzinger's Est.*, 170 Pa. St. 500; *Roberts v. Stevens*, 84 Me. 325; *Leavitt v. Beirne*, 21 Conn. 8; *Young v. Easley*, 94 Va. 193; *Jarboe v. Hey*, 122 Mo. 341; *Nichols v. Eaton*, 91 U. S. 716; *Potter v. Couch*, 141 U. S. 296.

(both accrued and to accrue in the future) beyond what is necessary for the suitable support and maintenance, according to his station in life, of the *cestui que trust* and those who are dependent upon him.¹ (a)

It is safe to add that on neither side of the Atlantic does any court hold that the founder of a trust, by making *himself* the beneficiary, can remove the property from the reach of his creditors either present or future.² In New York, for example, A may settle property in trust for B for life, so that B's creditors can not reach the income suitable for the support of B and those dependent upon him; but if the settlement were by A in trust for himself for life, his creditors could take it all.³

§ 336. **Separate Use Trusts for Married Women.** — Because of the great power and control of a husband over the property belonging to his wife, the method early came into use in England, and was favored and fostered by the Court of Chancery, of making settlements in trust "for the sole and separate use" of married women. This may be done, either by employing the words just quoted, which have come to be the technical form, or by using any equivalent expression, or by otherwise making the trust in such a manner as expressly or by necessary implication to show an intent to exclude the husband's

(a) The New York statute, which was originally 1 R. S. 729, § 57, and is now Real Property Law (L. 1896, ch. 547), § 78, provides that "Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum necessary for the education and support of the beneficiary, shall be liable to the claims of his creditors in the same manner as other personal property, which cannot be reached by execution." The "education and support" includes not only that for himself according to his station in life, but also that for the support of his wife, and the education and support of his children, and the maintenance generally of those properly dependent upon him. Code Civ. Pro. §§ 1871-1879; *Wetmore v. Wetmore*, 149 N. Y. 520; *Everett v. Peyton*, 167 N. Y. 117; *Sherman v. Skuse*, 166 N. Y. 345. See the note on New York express trusts, at the end of this chapter. Also, when the debt is for necessities sold, or domestic servants' wages, or for services for salary owing to an employee of the judgment debtor, the creditor may reach the income in excess of twenty dollars per week. Code Civ. Pro. § 1391.

¹ See *Spring v. Randall*, 107 Mich. 103; N. J. Gen. Stat. p. 1424, § 43; *Liun v. Davis*, 58 N. J. L. 29. This New Jersey statute makes all the income over \$4,000 available for creditors of the *cestui que trust*.

² *Pac. Nat. Bk. v. Windram*, 133 Mass. 175; *Ghormley v. Smith*, 139 Pa. St. 584; *Schenck v. Barnes*, 156 N. Y. 316, 319.

³ *Schenck v. Barnes*, 156 N. Y. 316, 321.

marital rights as to that property.¹ It is not necessary to name a trustee in such a case. The husband himself may be made trustee, and compelled to manage the property solely for the benefit of his wife; and, when no trustee is named, equity will usually require him to occupy that position.²

After some vacillation, it was settled by the English courts that the wife might dispose of, encumber, or otherwise anticipate a trust interest settled upon her for her sole and separate use.³ And the same view was adopted by most of the American tribunals.⁴ This was apt to restore the husband's beneficial control over the property, through the influence which he could ordinarily exercise over his wife. In order to obviate this difficulty and to make it possible to give property in trust for a married woman so that she could not use or dispose of it in any way for the benefit of her husband, though she might desire to do so, the clause *against anticipation*, so called, was framed by Lord Thurlow, added to the words of such settlements and decided by the courts in both countries to be effective in preventing her disposition of the property so long as she is covert.⁵ In making such a settlement, therefore, the land is disposed of in trust for her, "for her sole and separate use" (or by words of like import), and the statement is added concerning the settlement that it is "*not by way of anticipation.*" With a trust thus made in her favor, she can not dispose of nor encumber her interest in any way during coverture; but at any time when she is discov'ert, whether before she has married at all or while she is a widow, she

¹ *Parker v. Brooke*, 9 Ves. 583; *Jourdan v. Dean*, 175 Pa. St. 599; *Duffield's Appeal*, 168 Pa. St. 171; *Stuart v. Kissam*, 2 Barb. (N. Y.) 494; *Nix v. Bradley*, 6 Rich. Eq. (S. C.) 48; *Lippencott v. Mitchell*, 94 U. S. 767; 2 *Perry on Trusts*, §§ 646-649.

² *Bennet v. Davis*, 2 P. Wms. 316; *Richardson v. Stodder*, 100 Mass. 528; *Barron v. Barron*, 24 Vt. 375; *Vance v. Nogle*, 70 Pa. St. 179; 2 *Perry on Trusts*, § 647.

³ *Taylor v. Meade*, 4 DeG. J. & Sm. 597; *Wainford v. Heyl*, L. R. 20 Eq. 324.

⁴ *Ankeney v. Hannon*, 147 U. S. 118; *Dyett v. Central Trust Co.*, 140 N. Y. 54; *Home Mut. L. Ins. Co. v. Marshall*, 32 N. J. Eq. 103; *Hulme v. Tenant*,

1 *Lead. Cas. Eq.* (4th. Amer. ed.) 756; 2 *Perry on Trusts*, §§ 655-669.

⁵ *Hood-Barrs v. Heriot* (1896), App. Cas. 174; *Shirley v. Shirley*, 9 Paige (N. Y.), 363; *Waters v. Tazewell*, 9 Md. 291; *Bank v. James*, 95 Tenn. 8; 2 *Lewin on Trusts*, p. * 781; 2 *Perry on Trusts*, §§ 670, 671. The question has been much debated as to the validity of such a clause, in view of the general rule against restraint on the alienation of real property. But in favor of provisions for married women the prohibition against their alienation of separate use estates while covert is everywhere sustained. See *Case v. Green*, 78 Mich. 540; *Pritchard v. Bailey*, 113 N. C. 521; *Bispham's Prin. Eq.* § 107; *Gray, Perpetuities*, §§ 432-437.

may sell, or alienate, or encumber her equitable estate at her pleasure. Whenever she is covert, the clause against anticipation is operative; and it is inoperative whenever she is discovert.¹

In a few of the United States, however, of which Pennsylvania and Massachusetts are the leading ones, no such trust can be effectual, unless made for the benefit of a woman who is covert at the time or who is in "immediate contemplation of marriage;" and in such states it ceases to be a separate use trust as soon as she becomes a widow, and never revives again though she remarry.²

As remarked above, in many states this form of express trust is not now so important as it was before modern legislation gave to married women complete or large control over their own property.

§ 337. **Trusts for Charities.** — "It is said that courts look with favor upon charitable gifts, and take special care to enforce them, to guard them from assault, and protect them from abuse. And certainly charity in thought, speech, and deed challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory; and an inspired apostle exhausts his powerful eloquence in setting forth its beauty, and the nothingness of all things without it. Charitable bequests are said to come within that department of human affairs wherein the maxim, *ut res magis valeat quam pereat*, has been, and should be applied."³

Without speculating upon the unsettled question of the origin of trusts for charity, or "charitable uses," except to remark that the occasion for and principles of such gifts must arise and grow in every community with the advance of civilization and culture, it is to be first observed that, not only were charitable donations numerous in the medieval history of

¹ Tullett v. Armstrong, 4 Myl. & Cr. 377; Shirley v. Shirley, 9 Paige (N. Y.), 363; Beaufort v. Collier, 6 Humph. (Tenn.) 487; Staggers v. Matthews, 13 Rich. Eq. (S. C.) 154. The English Conveyancing and Property Act of 1881, § 39, empowers the Chancery Division to dispense with a restraint on alienation. But this is a discretionary power, which the court exercises with caution. It does not belong to a court of equity, except as given by statute.

Harrison v. Harrison, L. R. 4 Ch. Div. 418; Robinson v. Wheelwright, 6 De G. M. & G. 535.

² Moore v. Stinson, 144 Mass. 594; Quin's Est., 144 Pa. St. 444, 449; Denis' Est., 201 Pa. St. 616; Apple v. Allen, 3 Jones Eq. (N. C.) 120; Bispham's Prin. Eq. § 106.

³ 2 Perry on Trusts, § 687, citing Saltonstall v. Sanders, 11 Allen (Mass.), 446, 455.

England, but also, as the Court of Chancery developed and assumed importance, no doubt finding precedents in the Roman law which had carefully fostered charitable devises and bequests from the time when it began to be influenced by Christian teaching,¹ that court quickly took cognizance of such donations, and perfected a scheme for their proper judicial care and administration.² By the time of the beginning of the conflict between Henry VIII. and the pope for ecclesiastical supremacy in England, that scheme had been perfected, and quite a number of cases — records of probably as many as fifty are now extant — had already been taken cognizance of and settled as charities.³ Henry VIII., led by his determination to overthrow the papal influence, abolished many charitable institutions by statutes. It is said that even the great universities were obliged to petition the king, that they might not come within the general words “colleges and fraternities,” as used in those statutes.⁴ But after this struggle was over, and Elizabeth’s claim to the throne was established, and the success of the Reformation was no longer in doubt, the demand for eleemosynary institutions and those for other public utility was soon again manifest. This led to a series of statutes for restoring and encouraging such foundations, which were passed between the first and forty-third years of the reign of Elizabeth.⁵ The last and most important of these is the act of 43 Eliz. ch. 4 (1601), which is known as the Statute of Charitable Uses. The purpose and operation of that enactment was to supply an enumeration and definition of what uses are to be regarded as charitable, to hunt up all existing charities, and to enforce

¹ Domat, Civ. L. bk. 4, tit. 2, § 6; *White v. White*, 1 Bro. Ch. 12; *Jackson v. Phillips*, 14 Allen (Mass.), 539.

² This is shown by the reports of the English commissioners of public records, published in 1827, 1830, and 1832.

³ Commissioners’ reports, mentioned in preceding note. In the litigation over Stephen Girard’s will, this historical question was much discussed; and Mr. Binney, using the above-cited reports, showed clearly that the Pennsylvania Court of Chancery had inherent jurisdiction of the charitable use therein involved, although the *Statute of Charitable Uses* (43 Eliz. ch. 4) was not in force in that state; for this jurisdic-

tion of equity did not originate in that statute. *Vidal v. Girard’s Executors*, 2 How. (U. S.) 127. See also *Tappan v. Deblois*, 45 Me. 122; *Williams v. Williams*, 8 N. Y. 525, 533; *Atty.-Gen. v. Moore*, 19 N. J. Eq. 503; *Ould v. Washington Hospital*, 95 U. S. 303; *Stuart v. Easton*, 74 Fed. Rep. 854.

⁴ 33 Hen. VIII. ch. 27; 1 Burnet, *Hist. Reform.*, pp. 346, 347, 404-434; *Comm’rs v. Pemsell* (1891), App. Cas. 531, 543, 591.

⁵ 1 Eliz. ch. 4, §§ 34, 40, 85; 8 Eliz. ch. 11; 14 Eliz. ch. 14; 31 Eliz. ch. 6; 35 Eliz. ch. 3; 39 Eliz. ch. 4, 21; 43 Eliz. ch. 2, 3; *Perry on Trusts*, § 691.

their due and proper administration.¹ It gave a strong impetus to such settlements. But, although it was thought for a long time that the jurisdiction of equity over charitable trusts originated in this statute,² it is now thoroughly settled that such is not the truth of history.³ And, therefore, in those states of this country in which it has not been expressly adopted or re-enacted, trusts for charity are nevertheless fully within the jurisdiction of the courts of equity.⁴

§ 338. **Definitions and Essentials of Charitable Trusts.**—Charity, in its legal sense, always implies *public utility*.⁵ Dealing with the *purpose* rather than with the *motive* of the gift,⁶ such is the conception at the base of the most approved definitions of a charitable use. Lord Camden defined it as, “a gift to a general public use, which extends to the poor as well as to the rich.”⁷ And this definition has met with the approval of the highest authorities.⁸ With perhaps too much stress laid on the mere motive, Mr. Binney, in his noted argument in the Girard Will Case, declared that a charitable donation is “whatever is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private, or selfish.”⁹ In the great leading case of *Jackson v. Phillips*,¹⁰ Mr. Justice Gray

¹ The statute provided for a commission to look after abuses of charities and for proceedings through it for the administration of funds devoted to such purposes. But this method of procedure soon fell into disuse; and proceedings in equity by original bill or petition have continued to be the method of dealing with such gifts. *Atty.-Gen. v. Newman*, 1 Chan. Cas. 157; *Eyre v. Shaftesbury*, 2 P. Wms. 102, 119; *Atty.-Gen. v. Brereton*, 2 Ves. Sr. 425; *West v. Knight*, 1 Chan. Cas. 134.

² See *Trustees of Baptist Church v. Hart's Executors*, 4 Wheat. (U. S.) 1; 1 Spence's Eq. 589.

³ *Vidal v. Girard's Executors*, 2 How. (U. S.) 127; *Williams v. Williams*, 8 N. Y. 525, 533; *Ould v. Washington Hospital*, 95 U. S. 303; *Stuart v. Easton*, 74 Fed. Rep. 854.

⁴ *Holland v. Alcock*, 108 N. Y. 312, 332; *Williams v. Williams*, 8 N. Y. 525; *Pell v. Mercer*, 14 R. I. 412; *Hal-*

sey v. Convention of Prot. Epis. Church, 75 Md. 275.

⁵ *Coggeshall v. Pelton*, 7 Johns. Ch. (N. Y.) 292, 294; *Perin v. Carey*, 24 How. (U. S.) 465, 506; *Jones v. Williams, Ambler*, 651.

⁶ *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624.

⁷ *Jones v. Williams, Ambler*, 651, 652.

⁸ It was adopted as correct by Lord Lyndhurst, in *Mitford v. Reynolds*, 1 Phil. Ch. 185, 191; by Chancellor Kent in *Coggeshall v. Pelton*, 7 Johns. Ch. (N. Y.) 292, 294, and by the Supreme Court of the United States in *Perin v. Carey*, 24 How. (U. S.) 465, 506.

⁹ *Vidal v. Girard's Executors*, 2 How. (U. S.) 127. See *Ould v. Washington Hospital*, 95 U. S. 303, 311; *Union Pac. R. Co. v. Artist*, 19 U. S. App. 612.

¹⁰ 14 Allen (Mass.), 539, 555.

framed a more complete definition, which has been generally approved and which has the important advantage of stating concisely the classes of purposes or objects for which such donations are made. He said: "A charity in a legal sense may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, — either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."¹ The purposes here enumerated may be tersely and generally described by four adjectives, which import public utility, namely: religious, educational, eleemosynary, and governmental.² The gift is also "for the benefit of an indefinite number of persons." And "existing laws" put no time limitation upon such a trust. It is, therefore, to be here repeated that charitable uses or trusts have three leading and distinguishing features, namely: *first*, their purpose must be some public utility, and, therefore, they must exist for the benefit of the public generally, or of some considerable portion of it which answers to a particular description; *second*, their beneficiaries must be indefinite as to the individuals, and *third*, they are not restricted as to time, by the rule against perpetuities, but may be made to continue indefinitely.³ Around these three essential features naturally clusters the discussion of this interesting form of trust, which has occupied so large a share of the attention and employed so much of the best learning and ability of the bench and bar of both England and America.⁴

¹ This is approved in *Newcomb v. Boston Protect. Dep't.*, 151 Mass. 215; *Kelly v. Nichols*, 17 R. I. 306, 18 R. I. 82. And it is adopted by the best text-writers. See *Bispham's Prin. Eq.* § 124; *2 Perry on Trusts*, § 697.

² In *Commissioners v. Pemsel* (1891), App. Cas. 531, Lord McNachten said: "Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty, trusts for the advancement of education, trusts for the ad-

vancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads."

³ § 308, *supra*.

⁴ A few of the great leading cases, in which the subject has been exhaustively discussed, are: *Atty.-Gen. v. Baliol Coll.*, 9 Mod. 407; *Morice v. Bishop of Durham*, 9 Ves. 399, 405; *Atty.-Gen. v. Ironmongers' Co.*, 2 Beav. 313; *Atty.-Gen. v. Glyn*, 12 Sim. 84; *Farquhar*

§ 339. **First. Charitable Trusts are for Public Utility. Purposes included.**—The preamble of the Statute of Elizabeth (43 Eliz. ch. 4) contains the following enumeration of uses which are to be regarded as charitable, namely: "The relief of aged, and impotent, and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning; free schools; scholars in universities; houses of correction; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; the education and preferment of orphans; the marriages of poor maids; supportation and help of tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants concerning the payment of fifteenths, setting out of soldiers and other taxes." While in states which have not substantially re-enacted nor in any way adopted this statute, such as Maine or Pennsylvania,¹ the list here given is not, of course, controlling; yet within the letter or *spirit* of this enumeration are to be found the great mass, if not all, of the donations in trust which have been decided to be charitable. In respect to religious institutions, the *letter* of the statute is most deficient;² and this is probably due to the apprehension on the part of its framers that the reformation might possibly be a failure. But there never has been any room for doubt that gifts for religious objects, as well as practically all others which have since been treated as charitable, are clearly within the *spirit*, or "*equity*" of the Statute of Elizabeth.³ Most of these, though probably not all, are embraced within the four groups indicated by the adjectives above-mentioned, — educational, religious, eleemosynary, and governmental. A few words are required as to each of these.

§ 340. **Gifts for Religious Purposes. Superstitious Uses.**—Gifts for religious purposes are charitable: as for foreign mis-

v. Darling (1896), 1 Ch. 50; *Whicker v. Hume*, 7 H. L. Cas. 124; *Jackson v. Phillips*, 14 Allen (Mass.), 539; *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 127, 128; *Phila. v. Girard's Heirs*, 45 Pa. St. 9, 27; *Magill v. Brown*, Brightly (Pa.), 347, 350; *Hopkins v. Grimshaw*, 165 U. S. 342; *Fontain v. Ravenel*, 17 How. (U. S.) 369, 387; *Lorings v. Marsh*, 6 Wall. (U. S.) 337; *Bascom v. Albertson*, 34 N. Y. 584; *Williams v. Williams*, 8 N. Y. 525; *Kinnard v. Miller's Ex'rs*, 25 Gratt. (Va.) 107; *Almy v. Jones*,

17 R. I. 265. See *Fosdick v. Town of Hempstead*, 125 N. Y. 581; *Tilden v. Green*, 130 N. Y. 29; *Dwight Charity Cases*.

¹ *Tappan v. Deblois*, 45 Me. 122; *Brooks v. City of Belfast*, 90 Me. 318; *Whitman v. Lex*, 17 S. & R. (Pa.) 88.

² It will be noticed that no religious object is mentioned, in the list quoted, except the "repairs of . . . churches."

³ 2 Perry on Trusts, § 701; *White v. White* (1893), 2 Ch. 41.

sions;¹ for the advancement of Christianity among infidels;² "for the service of my Lord and Master";³ for the benefit of ministers of the Gospel;⁴ for distributing Bibles and religious books and tracts;⁵ for the poor and the service of God;⁶ and the like.⁷

When a trust of this general character runs counter to the English ecclesiastical law, it is there condemned as a "superstitious use."⁸ All such donations, as, for example, for praying for souls of the dead, maintaining *obit* lamps, etc., which were contrary to the tenets of the established church, were formerly condemned.⁹ But the English courts are now much more liberal in this respect,¹⁰ although they still set aside so-called charitable schemes which clearly attack or oppose the religious policy of the realm; as, for example, a devise or bequest for the re-establishment of the supremacy of the pope.¹¹ In this country, where religious liberty is guaranteed by the Constitutions,¹² no trust is ever successfully attacked merely on the ground that it is a superstitious use.¹³ But some gifts, which have a religious aspect, are declared to be void, not because they are superstitious, but because they are deemed

¹ Bartlett v. King, 12 Mass. 537; Fairbanks v. Lamson, 99 Mass. 533; Bridges v. Pleasants, 4 Ired. Eq. (N. C.) 26.

² Atty.-Gen. v. William & Mary's Coll., 1 Ves. 243.

³ Going v. Emery, 16 Pick. (Mass.) 107; Powerscourt v. Powerscourt, 1 Moll. 616.

⁴ Atty.-Gen. v. Gladstone, 13 Sim. 7; Grieves v. Case, 4 Bro. Ch. 67; Cory Universalist Soc. v. Beatty, 28 N. J. Eq. 570.

⁵ Atty.-Gen. v. Stepney, 10 Ves. 22; Bliss v. Amer. Bible Soc., 2 Allen (Mass.), 334; Pickering v. Shotwell, 10 Pa. St. 23; Church v. Hinton, 92 Tenn. 188.

⁶ Farquhar v. Darling (1896), 1 Ch. 50; People v. Cogswell, 113 Cal. 129.

⁷ *In re* Hunter (1897), 2 Ch. 105; Rosf's Charity (1899), 1 Ch. 21; *In re* Scowcroft (1898), 2 Ch. 638; Teele v. Bishop of Derry, 168 Mass. 341; McAlister v. Burgess, 161 Mass. 269; Christ Church v. Trustees, 67 Conn. 554; Alden v. St. Peter's Parish, 158 Ill. 631; Mack's Appeal, 71 Conn. 122.

⁸ This doctrine originated in the statute 1 Edw. VI. ch. 14. See *De Themmines v. De Bonneval*, 5 Russ. 288; *Doe v. Hawthorn*, 2 Barn. & Ald. 96; *Briggs v. Hartley*, 14 Jur. 683.

⁹ *De Themmines v. De Bonneval*, 5 Russ. 288; *Atty.-Gen. v. Baxter*, 1 Vern. 248, 2 Vern. 105, 1 Eq. Cas. Ab. 96, pl. 9; *Da Costa v. De Pas*, Ambler, 228; *Finley v. Hunter*, 2 Strob. Eq. 208.

¹⁰ *Atty.-Gen. v. Pearson*, 3 Mer. 353; *Atty.-Gen. v. Cock*, 2 Ves. Sr. 273; *Atty.-Gen. v. Hickman*, 2 Eq. Cas. Ab. 193; *Reichenbach v. Quin*, 21 L. R. Ir. 138; *Schouler*, Petitioner, 134 Mass. 426; *Holland v. Alcock*, 108 N. Y. 312; 1 Ames on Trusts (2d ed.), 211.

¹¹ *De Themmines v. De Bonneval*, 5 Russ. 288.

¹² *Cooley*, Const. Lim. 575.

¹³ *Holland v. Alcock*, 108 N. Y. 312; *Teele v. Bishop of Derry*, 168 Mass. 341; *Hoeffler v. Cloghan*, 171 Ill. 462; *Seibert's Appeal*, 19 Pa. St. 49; *Sherman v. Baker*, 40 Atl. Rep. 11 (R. I.). See this matter further discussed, § 345, *infra*.

to violate some *American* principle of morality or public policy.¹ Thus, a trust for the benefit of an infidel society, or to encourage immoral, so-called religious rites, will not be sustained.² In the discussion of the uncertainty of the objects of a charitable use, it will also be shown hereafter that some trusts of the kind which have been held to be superstitious in England have failed in this country, because, being created in form as charities and only sustainable as such, they have been decided to be wanting in some of the requisites of such gifts.³

§ 341. **Gifts for Educational Purposes.** — Gifts for educational purposes are charitable: as to establish Inns of Chancery for the prosecution of the study of law;⁴ for the foundation of a fellowship or lectureship in a college or university;⁵ to create a "change of sentiment" in regard to slavery, or other matters, which means to educate;⁶ for the cultivation of art, or instruction in the mechanical arts;⁷ to advance learning;⁸ for the support of schools, libraries, or literary institutions,⁹ and all similar foundations which aim at intellectual advancement.¹⁰

§ 342. **Gifts for Eleemosynary Purposes.** — Gifts for purely eleemosynary purposes are charitable: as those for hospitals, "homes," and asylums;¹¹ for the widows and orphans of a parish;¹² for the relief of Indians;¹³ to suppress and abolish

¹ *Holland v. Alcock*, 108 N. Y. 312; *In re Zimmerman's Will*, 50 N. Y. Supp. 395; *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327; *Moran v. Moran*, 104 Iowa, 216; *McHugh v. McCole*, 97 Wis. 166; *Harrison v. Brophy*, 59 Kan. 1.

² *Zeisweiss v. James*, 63 Pa. St. 465; 1 *Ames on Trusts* (2d ed.), 211.

³ § 345, *infra*.

⁴ *Smith v. Kerr* (1902), 1 Ch. 774.

⁵ *Rex v. Newman*, 1 Lev. 294; *Atty.-Gen. v. Bowyer*, 3 Ves. 714.

⁶ *Jackson v. Phillips*, 14 Allen (Mass.), 539, 552; *George v. Brad-dock*, 45 N. J. Eq. 757.

⁷ *Almy v. Jones*, 17 R. I. 265; *People v. Cogswell*, 113 Cal. 129.

⁸ *Whicker v. Hume*, 7 H. L. Cas. 124; *Stevens v. Shippen*, 28 N. J. Eq. 487; *Taylor v. Bryn Mawr*, 34 N. J. Eq. 101.

⁹ *Daury v. Inhab. of Natick*, 10 Allen (Mass.), 169; *Episcopal Academy v*

Phila., 150 Pa. St. 565; *Phila. v. Overseers*, 170 Pa. St. 257; *Baley v. Umatilla Co.*, 15 Oreg. 172; *Miller's Ex'rs v. Commonwealth*, 27 Gratt. (Va.) 110, 116.

¹⁰ *In re Douglas*, L. R. 35 Ch. Div. 472, 479; *Vidal v. Girard's Ex'rs*, 2 How. (U. S.) 127; *Penn's Hospital v. Delaware*, 169 Pa. St. 305; *Clement v. Hyde*, 50 Vt. 716; *Halsey v. Convent P. E. Church*, 75 Md. 275; *Miller v. Atkinson*, 63 N. C. 537; *Paschal v. Acklin*, 27 Tex. 173; *Barkley v. Donnelly*, 112 Mo. 561.

¹¹ *Atty.-Gen. v. Vint*, 3 DeG. & Sm. 704; *Atty.-Gen. v. Kell*, 2 Beav. 575; *McDonald v. Mass. Hospital*, 120 Mass. 432.

¹² *Atty.-Gen. v. Comber*, 2 Sim. & St. 93; *Towle v. Nesmith*, 69 N. H. 212; *Sheldon v. Stockbridge*, 67 Vt. 299; *Trim's Estate*, 168 Pa. St. 395; *Hoffen's Estate*, 70 Wis. 522.

¹³ *Magill v. Brown*, Brightly (Pa.), 347.

vivisection;¹ for taking care of domestic animals;² to suppress the manufacture and sale of intoxicating liquors,³ etc.⁴

§ 343. **Gifts for Governmental Purposes.** — Gifts for lessening the burdens of government are charitable: as for erecting and maintaining public buildings or other institutions;⁵ laying out, making, and keeping in repair streets, parks, and docks;⁶ for "repairs of bridges, ports, havens, causeways, . . . sea-banks, and highways;"⁷ to discharge a tax on the community;⁸ to supply water to the inhabitants of a town,⁹ or to build for it a botanical garden.¹⁰

§ 344. **Other Charities. Criterion as to Charitable Purpose.** — There are, in addition to these four classes, a few instances of donations which have been held to be charitable, but are difficult to classify. Illustrations are trusts "for charitable purposes;"¹¹ for such charities as the trustees shall think proper;¹² for charitable and religious objects,¹³ and similar provisions in which general public benefit is manifestly intended, but the more particular nature of the gift is not indicated.¹⁴ The character of such a gift as charitable must be clear, or it will not be upheld.¹⁵ Thus a trust for "philan-

¹ *In re Foveaux Cross* (1895), 2 Ch. 501.

² *In re Douglas*, L. R. 35 Ch. Div. 472; *Univ. of London v. Yarrow*, 1 DeG. & J. 72.

³ *Haines v. Allen*, 78 Ind. 100.

⁴ See also *Nash v. Morely*, 5 Beav. 177; *Davis v. Inhabitants*, 154 Mass. 224; *Hayes v. Pratt*, 147 U. S. 557; *Fosdick v. Town of Hempstead*, 125 N. Y. 581, 582, 126 N. Y. 651; *Strong's Appeal*, 68 Conn. 527; *Beurhaus v. Cole*, 94 Wis. 617; *Wood v. Paine*, 66 Fed. Rep. 807.

⁵ *Coggeshall v. Pelton*, 7 Johns. Ch. (N. Y.) 292; *Jackson v. Phillips*, 14 Allen (Mass.), 539, 556.

⁶ *Atty.-Gen. v. Heelis*, 2 Sim. & St. 67; *Howse v. Chapman*, 4 Ves. 542; *Mowry v. City of Providence*, 10 R. I. 52; *Smith's Estate*, 181 Pa. St. 109.

⁷ Preamble to statute, 43 Eliz. ch. 4.

⁸ *Atty.-Gen v. Bushby*, 24 Beav. 299.

⁹ *Jones v. Williams*, Ambler, 651.

¹⁰ *Townley v. Bedwell*, 6 Ves. 194. Also, on the general topic of public improvement, see *Johnston v. Swann*, 3 Madd. 457; *Beaumont v. Oliveira*, L. R.

4 Ch. 309; *In re Lord Stratheden* (1894), 3 Ch. 265; *Bartlett, Petitioner*, 163 Mass. 509; *Phila. v. Keystone Battery A*, 169 Pa. St. 526; *Hamden v. Rice*, 24 Conn. 350; *State v. Griffith*, 2 Del. Ch. 392; *Stuart v. Easton*, 39 U. S. App. 238.

¹¹ *Schouler, Petitioner*, 134 Mass. 426.

¹² *White v. Ditson*, 140 Mass. 351; *Jemmit v. Varrel*, Ambler, 585.

¹³ *Baker v. Sutton*, 1 Keen, 224; *Saltonstall v. Sanders*, 11 Allen (Mass.), 446, 454; *Treat's Appeal*, 30 Conn. 113; *Farquhar v. Darling* (1896), 1 Ch. 50.

¹⁴ See *Commissioners v. Peimel* (1891), App. Cas. 531, 583; *In re Cranstons* (1898), 1 Ir. R. 431; *George v. Braddock*, 45 N. J. Eq. 757, in which a gift was upheld for disseminating the doctrines of Henry George; *Webster v. Wiggins*, 19 R. I. 73, a donation for erecting working-men's dwellings; *Laue v. Eaton*, 69 Minn. 141; *Pack v. Shanklin*, 43 W. Va. 304; *Meeker v. Puyallup*, 5 Wash. St. 759; 24 Amer. Law Rev. 489; 30 Cent. Law Jour. 334; 38 Alb. Law Jour. 369.

¹⁵ *Morice v. Bishop of Durham*, 9 Ves.

thropic" purposes (which might or might not be for any public benefit), or for *private* benevolence is not charitable.¹ There has been considerable divergence of opinion as to whether or not the word "benevolent" will be, under any circumstances, a proper description of a charitable purpose.² The better view appears to be that it will be so, when there is nothing to the contrary in the context.³ A devise for "charitable and benevolent" purposes has generally been sustained as charitable in this country;⁴ although the opposite conclusion has been reached in some cases in England.⁵

The true test, with regard to the purpose of the gift, is probably that suggested by Sir Wm. Grant, in the case of *Morice v. The Bishop of Durham*,⁶ namely: whether or not, consistently with the apparent intention of the donor, the property can be applied to a purpose not charitable; if it can, the trust will not be administered as a charity.⁷ Because of their failure to conform to this *criterion*, such donations as the following have been held to be not charitable: "to secure the passage of laws granting women the right to vote and hold office;"⁸ "for the political restoration of the Jews to Jerusalem;"⁹ for purchasing and presenting a cup "to encourage yacht-racing;"¹⁰ to keep a supply of corn in London for the market;¹¹ to "support those of my children and their descendants who may be destitute;"¹² for charitable "*or other*" purposes.¹³ So, if the arrangement be the outcome of a contract,

399, 404; *Atty.-Gen. v. Soule*, 28 Mich. 153, 156; *Darcy v. Kelley*, 153 Mass. 433.

¹ *In re Macduff* (1896), 2 Ch. 451; *Farquhar v. Darling* (1896), 1 Ch. 50; *Ommanney v. Butcher*, 1 Turn. & Russ. 260; *Chamberlain v. Stearns*, 111 Mass. 267.

² See 2 Perry on Trusts, § 712, and note.

³ *Miller v. Rowan*, 5 Cl. & Fin. 99; *Goodale v. Mooney*, 60 N. H. 528, 535; *People v. Powers*, 147 N. Y. 104, 110; *Saltonstall v. Sanders*, 11 Allen (Mass.), 446, 468, 470; *Livesey v. Jones*, 55 N. J. Eq. 204, 205, 56 N. J. Eq. 453; *Murphy's Estate*, 184 Pa. St. 310.

⁴ *Saltonstall v. Sanders*, 11 Allen (Mass.), 446, 468; *Murphy's Estate*, 184 Pa. St. 310. See *Murdock v. Bridges*, 91 Me. 124; *Mass. Soc. for Prevention of Cruelty to Animals v. Boston*, 142

Mass. 24; *Chamberlain v. Stearns*, 111 Mass. 267.

⁵ *Williams v. Kershaw*, 5 Law Jur. (N. S.) Ch. 84; *Ommanney v. Butcher*, 1 Turn. & Russ. 260. See *Norris v. Thompson*, 19 N. J. Eq. 307; *Saltonstall v. Sanders*, 11 Allen (Mass.), 446, 462; *Boyle on Charities*, pp. 286-290.

⁶ 9 Ves. 404.

⁷ Also *Darcy v. Kelley*, 153 Mass. 433; *Rotch v. Emerson*, 105 Mass. 431.

⁸ *Jackson v. Phillips*, 14 Allen (Mass.), 539, 571; *Bacon v. Ransom*, 139 Mass. 117, 119.

⁹ *Habershon v. Vardon*, 7 Eng. L. & Eq. 228.

¹⁰ *Jones v. Palmer* (1895), 2 Ch. 649.

¹¹ *Atty.-Gen. v. Haberdashers' Co.*, 1 Myl. & K. 420.

¹² *Kent v. Dunham*, 142 Mass. 216.

¹³ *Ellis v. Selby*, 1 Myl. & Cr. 286, 299; *Chamberlain v. Stearns*, 111 Mass.

or statute, or business enterprise, *and* not a gift, it can not produce a charitable use or trust.¹ And, of course, a gift which violates the law of the land, or the principles of morality, can not be sustained because it purports to be charitable. Illustrations are found in attempted beneficences which violate local statutory restrictions as to the kind or amount of property which a testator may devote to charitable purposes.² Thus, in New York the general restriction is that one who dies leaving husband, wife, parent, or child surviving shall not dispose of more than half of his or her property to charitable institutions. (a)

(a) The general statute of New York, which applies to *all* societies, associations, and corporations of the character therein named, is Laws of 1860, ch. 360, which provides as follows: "No person having a husband, wife, parent, or child, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association, or corporation, in trust or otherwise, more than one-half of his or her estate, after the payment of his or her debts." In addition to this general act, there is a number of special statutes, each of which prescribes how kinds of corporations therein specified may be formed, and restricts the amount of a testator's property which a corporation so organized can take by his or her will, if he or she leave surviving a husband, wife, parent, or child, to one-quarter of his or her net estate; and also requires, as a prerequisite to the taking of even that amount, that the will shall have been made at least two months before the testator's death. Such are L. 1848, ch. 319, § 6; L. 1865, ch. 366, § 6, ch. 267, § 7, and ch. 343, § 5; L. 1886, ch. 236, § 7; L. 1887, ch. 315, § 5, and ch. 317, § 7. See *Stephenson v. Short*, 92 N. Y. 433; *Matter of Lampson*, 33 N. Y. App. Div. 49. Thus, if property be devised for charitable purposes, and one of them be a social club incorporated under L. 1865, ch. 366, or a

267; *Farquhar v. Darling* (1896), 1 Ch. 50; 28 Amer. Law Reg. (n. s.) 185. A trust for preparing or maintaining a monument, tomb, vault, or burial ground is charitable, if it be in connection with a church or religious society, or some public institution; but not if made solely for the benefit of the donor or of a definite number of individuals or families. *Hopkins v. Grimshaw*, 165 U. S. 342, 352; *Nauman v. Weidman*, 182 Pa. St. 263; *Bronson v. Strouse*, 57 Conn. 147; *Kelly v. Nichols*, 18 R. I. 62; *Ford v. Ford*, 91 Ky. 572.

¹ *Swift v. Beneficial Soc.*, 73 Pa. St. 362; *Brendle v. German Reformed Cong.*, 33 Pa. St. 415, 419; *World's Columbian Exposition*, 18 U. S. App.

42, 163, in which it was decided that a donation by Congress of money to have "Columbian" half-dollars coined for benefit of the exposition was not charitable.

² See N. Y. L. 1860, ch. 360; *Allen v. Stevens*, 161 N. Y. 122; *In re Hoffner's Estate*, 161 Pa. St. 331; *McClellan v. Wade*, 41 Pa. St. 266; *Taylor v. Mitchell*, 57 Pa. St. 209; *Reynolds v. Bristow*, 37 Ga. 283. For the English statutes of *mortmain* restricting gifts to religious corporations, see 2 Jarman on Wills, pp. 200-224; 2 Redfield on Wills (2d ed.), pp. 508-516; Tudor on Charities, 93, 101. Those statutes are not in force in this country.

§ 345. **Second. The Beneficiaries of Charitable Trusts must be Indefinite as to the Individuals.** — Indefiniteness in its objects is the second distinctive feature of a charitable use. It is not sufficient here to say, as do some writers, that the *cestuis que trustent* may be uncertain. They *must* be uncertain and indefinite, or the trust will be private. No matter how numerous the recipients may be, an establishment for them as known and determinate individuals is private and not public.¹ Thus, a trust to maintain a school, which is not free, but for the benefit of particular individuals and their families;² or a fund

political club incorporated under L. 1886, ch. 237, and the testator or testatrix leave husband, wife, parent, or child surviving, not more than one-half of his or her property can thus pass to all of the charitable institutions, and not more than one-quarter of it to the social or political club; and if such club were the only beneficiary of a charitable character, it could take only one-quarter, while if there were gifts to two such clubs, each of them could take one-quarter, if there were no other charities as beneficiaries, and they would thus take all that could be given to charity by that will. If an attempt be made to give more than is permitted by the statutes to a number of charities, the gifts will not fail entirely; but the amount which can be legally given will be distributed *pro rata* among them. *Hollis v. Drew Theological Seminary*, 95 N. Y. 166. L. 1860, ch. 360, applies to secret gifts, as where on the face of the will the property is given to the executor absolutely, but he is told orally by the testator how to apply it to charity. *Edson v. Bartow*, 154 N. Y. 199. Only the persons named in the statute — husband, wife, parent, or child — and those benefited through them can invoke its protection; and the advantages under it may be waived or relinquished by those who are entitled thereto. *Amherst College v. Rich*, 151 N. Y. 282, 332. It was decided in *Allen v. Stevens*, 161 N. Y. 122, 148, that when the gift is “not to a ‘society, association, or corporation in trust or otherwise,’ but instead to trustees” for such institution, it is not within the prohibition of the statute, L. 1860, ch. 360. In so far as they relate to personalty, these statutes apply only to domestic wills, i. e., wills made by persons domiciled in New York, the provisions of which wills are to be executed within that state. *Dammert v. Osborn*, 140 N. Y. 30, 40; *Hope v. Brewer*, 136 N. Y. 126; *Cross v. U. S. Trust Co.*, 131 N. Y. 339. When a corporation has all the property that it is authorized to hold, so that it can not hold any more, it can not take any more, even for the purpose of passing it at once to other beneficiaries. *Matter of McGraw*, 111 N. Y. 66, 136 U. S. 152.

¹ *Bullard v. Chandler*, 149 Mass. 532, 540; *Holland v. Alcock*, 108 N. Y. 312, 330; *Burke v. Roper*, 79 Ala. 138, 142; *State v. Griffith*, 2 Del. Ch. 392. “In order that there may be a good trust for a charitable use, there must always be some public benefit open to an indefinite and vague number; that is, the persons

to be benefited must be vague, uncertain, and indefinite, until they are selected or appointed to be the particular beneficiaries of the trust for the time being.” 2 *Perry on Trusts*, § 710.

² *Blandford v. Fackerell*, 4 Bro. Ch. 394.

raised by an association by payment of subscriptions or dues for the exclusive use of its own members, however many they may be, is not charitable in its nature.¹ But a settlement of property for the perpetual use of a designated church, school, or hospital, is to be carried out as a public trust, because the members, scholars, or inmates, who are to be thereby assisted, are unascertainable as to who they are to be in the future.² This is the fundamental and logical distinction, as applied to some extent in this country, between the cases which have sustained gifts for uses of the kind called superstitious in England, and those in which such gifts have been overthrown. For it is held by some, probably the majority of our courts, including those of New York, Massachusetts, Pennsylvania, and Illinois, that trusts for the purpose of having masses or prayers said for the souls of the dead, keeping *obit* lamps burning, etc., are charitable, because they are to be regarded as beneficial to all who may take part in the ceremonies, or hear or see them;³ while in a few other states, among which Alabama is prominent, it is decided that such uses are private, being, it is there said, designed in substance for the benefit of the specified dead persons alone, and that, therefore, when they are attempted to be made to run on perpetually or for a time longer than that permitted by the rule against perpetuities, which a private trust can not legally do, they must be declared void.⁴

§ 346. **Degree of the Uncertainty.** — As to the *degree* of uncertainty which may legally characterize charitable uses, there is much confusion in the cases.⁵ But the principle deducible from the large majority and weightier of them, which is also supported by the better reasoning, is that, while the individual

¹ *Coe v. Washington Mills*, 149 Mass. 543; *Stratton v. Physio-Medical College*, 149 Mass. 505; *Babb v. Reed*, 5 Rawle (Pa.), 151. Compare *Union Pac. R. Co. v. Artist*, 60 Fed. Rep. 365.

² Last two preceding notes; 2 *Perry on Trusts*, § 732.

³ *Hoeffer v. Clogon*, 171 Ill. 462; *Holland v. Alcock*, 108 N. Y. 312; *In re Zimmerman's Will*, 50 N. Y. Supp. 395; *Teele v. Bishop of Derry*, 168 Mass. 341; *Schouler, Petitioner*, 134 Mass. 426; *Kerrigan v. Tabb*, 39 Atl. Rep. 701 (N. J. Ch.); *Sherman v. Baker*, 40 Atl. Rep. 11 (R. I.); *Seibert's Appeal*, 19 Pa. St. 49.

⁴ *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327; *McHugh v. McCole*, 97 Wis. 166; *Harrison v. Brophy*, 59 Kan. 1; *Moran v. Moran*, 104 Iowa, 216.

⁵ This will appear from the reading of a few such cases as *White v. Fish*, 22 Conn. 31; *Grimes v. Harmond*, 35 Ind. 198; *Green v. Allen*, 5 Humph. (Tenn.) 170, and *Holland v. Peck*, 2 Ired. Ch. (N. C.) 255, which dealt with gifts to known charities such as it would seem ought to have been sustained; but in all of which it was held that the attempted donations failed because of vagueness and uncertainty.

beneficiaries must be indefinite, either the institution or class to which they are to belong, either in being or to come into being, must be pointed out with sufficient certainty, so that it can come into court and move for the administration of the trust,¹ or there must be a general charitable purpose manifested, and a trustee or trustees appointed, ready and willing to act and authorized to select the specific charitable object or objects to which the property shall be applied.² Thus, it is everywhere settled that, if a donor give property in trust to establish and maintain a specified school or hospital, but appoint no competent trustee, the settlement being in other respects valid, upon the application of the designated school or hospital the court will appoint a trustee and compel the employment of the property in the manner intended.³ So, by the weight of the better authorities, though here the cases diverge,⁴ when property is conveyed to competent and willing trustees, simply "for charitable purposes," or for such charitable purposes as they may select, and no institution is indicated as the recipient and as the *alma mater*, refuge, or home of the indefinite individuals to be helped, the court of equity will take cognizance of such a use and see that it is properly administered.⁵ And it need hardly be added that when a willing and capable trustee is named, and also the specific church, school, or other institution is pointed out, the court will take cognizance of the trust.⁶ But when neither of these

¹ Atty.-Gen. v. Garrison, 101 Mass. 223; Burrill v. Boardman, 43 N. Y. 254; Tilden v. Green, 130 N. Y. 29; Parker v. May, 5 Cush. (Mass.) 326, 341; Cottman v. Grace, 41 Hun (N. Y.), 345; Ireland v. Gerahty, 11 Biss. (U. S. Cir. Ct.) 465; Lewin on Trusts, p. *665; 2 Perry on Trusts, § 732.

² Saltonstall v. Sanders, 11 Allen (Mass.), 446; Hayes v. Pratt, 147 U. S. 557; Everett v. Carr, 59 Me. 325, 334; Derby v. Derby, 4 R. I. 414; Miller v. Atkinson, 63 N. C. 537; 2 Perry on Trusts, § 720.

³ Here the trust, already created and existing, is in all respects valid. It does not need the appointment of a trustee to bring the trust into existence; and equity will not allow the trust to fail for want of a trustee. Sears v. Chapman, 158 Mass. 400; Reeve v. Atty.-Gen., 3 Hare, 191; Inglis v. Sailors

Snug Harbor, 3 Pet. (U. S.) 99; Williams v. Pearson, 38 Ala. 299.

⁴ See next preceding note but one.

⁵ Hayes v. Pratt, 147 U. S. 557, 567; Livesey v. Jones, 55 N. J. Eq. 204, 56 N. J. Eq. 453, in which a gift was sustained, to "humanity's friend . . . B, to use and expend the same for the promotion of the religious, moral, and social welfare of the people in any locality, whenever and wherever he may think most needful and necessary;" Pulpress v. African Church, 48 Pa. St. 204; Saltonstall v. Sanders, 11 Allen (Mass.), 446; Everett v. Carr, 59 Me. 325, 334; Derby v. Derby, 4 R. I. 414; Treat's Appeal, 30 Conn. 113; Moore v. Moore, 4 Dana (Ky.), 354, 366.

⁶ Authorities cited in connection with preceding section, as to purposes of charitable trusts; 2 Perry on Trusts, §§ 698-705.

exists — no trustee, or none who is capable and willing to act, is appointed, and, while a charitable purpose is expressed, no specific organization or organizations are selected from the world of charity, — the attempted trust must fail, unless it can be supported by some local statute, or by some power which does not reside in any court as a *judicial* tribunal.¹ In England the Chancery Court's prerogative *cy pres* jurisdiction, which does not exist in this country, and which is explained hereafter,² may avail for the administration of this vague form of gift for charity generally. And it seems to be evident that chapter 701 of the Laws of 1893 of New York (now § 93 of Real Prop. Law, L. 1896, ch. 547), is an illustration, and probably the only one, of a local statute by virtue of which it could be sustained and administered by equity.³ For that act provides that no conveyance or device for such purpose, which is valid in other respects, is "to be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries;" and that, when no trustee is named, the attorney-general shall represent the beneficiaries and enforce the trusts by proper proceedings. This statute has not been fully construed, with reference to the degree of indefiniteness which it sanctions; and there are perhaps intimations opposed to the view of it here expressed.⁴ But when the act is looked at in the light of the litigation which led up to it, especially the contest over the Tilden will, the chief bequest of which failed because of the indefiniteness of its designated beneficiaries,⁵ the conclusion appears to be most logical and reasonable that the legislative intent was to do away entirely with all difficulties of that character in connection with charitable trusts.⁶ This New York statute is more fully examined hereafter.⁷ It restored charitable uses in New York after they had been discarded for upwards of a century.

§ 347. The *Cy Pres* Doctrine. Judicial *Cy Pres*. — As an

¹ *Moggridge v. Thackwell*, 7 Ves. 36; *Paice v. Canterbury*, 14 Ves. 370; *The Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1; *Everett v. Carr*, 59 Me. 325, 334; *Boyle on Charities*, 241; *Bispham's Prin. Eq.* § 128.

² § 348, *infra*.

³ The treatment of gifts for charity in New York has been unique. It is

explained in the note on New York express trusts, at the end of this chapter.

⁴ *Dammert v. Osborn*, 140 N. Y. 30, 43. See *Fowler, Charitable Uses, Trusts & Donations*, pp. 104-106.

⁵ *Tilden v. Green*, 130 N. Y. 29.

⁶ *Rothschild v. Goldenberg*, 58 N. Y. App. Div. 499. The statute is very liberally construed in *Allen v. Stevens*, 161 N. Y. 122.

⁷ Note at end of this chapter.

emphatic illustration of the maxim, *ut res magis valeat quam pereat*, the peculiar principle known as the *cy pres* doctrine sometimes operates to aid in determining the class or classes of the beneficiaries of a charitable use. That doctrine, with the limitation placed upon it in this country, which makes it merely a rule of construction, is as follows: when a gift is made for a charitable use, which is lawful and valid at the time of the execution of the instrument creating it, and, while indicating the general nature and purpose of the trust, the donor has not expressed any intention to restrict it to any particular institution or object alone; and afterwards the scheme outlined by him becomes illegal or impracticable because of a change of the law or circumstances, a court of equity, looking at his general charitable design, and seeking to ascertain and accomplish what he would have done had he lived to know of the change of law or circumstances, does not allow the trust to fail, or result to his heirs, but applies the property as nearly as possible (*cy pres*) in the manner and for the particular objects mentioned in the instrument. Such instruments are ordinarily wills; and the change of law or circumstances usually occurs after the death of the testator.¹ For example, in *Jackson v. Phillips*,² a case which did much to elucidate this doctrine and the principles generally of charitable uses, a gift was made by the will of Francis Jackson to trustees, for the purpose of having books and papers circulated, speeches and lectures delivered, and such other means employed "as in their judgment will create a public sentiment that will put an end to negro slavery in this country," and also for "the benefit of fugitive slaves escaping from the slave-holding states." Slavery in this country was abolished after the testator's death, but before the litigation over his will had terminated. The trust could not be carried out precisely as directed. But what the testator really wanted, under the changed condition of affairs, could be practically effectuated by the court; the people in

¹ *Jackson v. Phillips*, 14 Allen (Mass.), 539, 586; *The Late Corp. of The Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1, 140 U. S. 665, 150 U. S. 145; *Hopkins v. Grimshaw*, 165 U. S. 342, 353; *Minot v. Baker*, 147 Mass. 348; *Atty-Gen. v. Briggs*, 164 Mass. 561; *Amory*

v. Atty-Gen., 179 Mass. 89; *Women's Church Ass'n. v. Campbell*, 147 Mo. 163; *Hannen v. Hillyer* (1902), 1 Ch. 876; N. Y. Laws, 1893, ch. 701, as amended by N. Y. Laws, 1901, ch. 291; *Bispham's Prin. Eq.* § 128.

² 14 Allen (Mass.), 539.

America for whom his bounty was designed could still be thereby benefited. The matter was referred to a master in chancery to devise a scheme *cy pres* for the application of the property; with the result that it was ultimately settled in trust for the New England Branch of the Freedmen's Union Commission. A similar case in England is that of the Attorney-General *v. Ironmongers' Co.*,¹ which is generally mentioned as the "Ironmongers' Case." There the gift in question was to trustees to apply to the redemption of British slaves in Turkey and Barbary. After some years there ceased to be any British slaves in those countries to redeem. The fund having then accumulated for a long time, the court, upon the application of the attorney-general, ordered the income to be applied *cy pres* to a number of other charities as nearly as possible like those mentioned in the will. As stated above, the doctrine invoked in such cases is a *rule of construction* of wills, applied by courts of equity in favor of charitable donations. The judgments are judicial acts, determining what is the intention or probable intention of the testator.² Therefore, if, from the language employed, and all the circumstances of the case, it seem probable that the donor had no ulterior purpose in case of the failure of his directly expressed intent, the charity must fail if that intent can not be strictly carried out.³ "If the construction shows that the fund was to be employed in the way pointed out forever, *and in no other way*, then all *cy pres* construction must fail."⁴

¹ 2 Beav. 313, Cr. & Ph. 308. See also the Baliol College Case, Atty.-Gen. *v. Baliol Coll.*, 9 Mod. 407; Atty.-Gen. *v. Guise*, 2 Vern. 266; Atty.-Gen. *v. Glasgow Coll.*, 2 Collyer, 665, 1 H. L. Cas. 800; Atty.-Gen. *v. Glyn*, 12 Sim. 84.

² *In re St. Stephens*, L. R. 39 Ch. Div. 492; *In re Villers-Wilkes*, 72 L. T. Rep. 323; *White v. White* (1893), 2 Ch. 41; *Lorings v. Marsh*, 6 Wall. (U. S.) 337; *The Late Corp. of The Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1; 140 U. S. 665; *Young v. Commissioners*, 51 Fed. Rep. 585; *Barnard v. Adams*, 58 Fed. Rep. 313; *Darcy v. Kelley*, 153 Mass. 433; Atty.-Gen. *v. Briggs*, 164 Mass. 561; *Doyle v. Whalen*, 87 Me. 414; *Adams Female*

Academy v. Adams, 65 N. H. 225; *Hayden v. Conn. Hospital*, 64 Conn. 320; *Kelly v. Nichols*, 18 R. I. 62; *Campbell v. Kansas City*, 102 Mo. 326; *Women's Church Ass'n v. Campbell*, 147 Mo. 163; *Duke on Uses*, 624; 8 Harvard Law Rev. 69.

³ *Teele v. Bishop of Derby*, 168 Mass. 341; Atty.-Gen. *v. Hurst*, 2 Cox, 364; *Carter v. Balfour*, 19 Ala. 814; 2 Perry on Trusts, § 726. So if special confidence be placed in trustees named, and they die or become incapacitated without executing the trust, it must fail. *Fontain v. Ravenel*, 17 How. (U. S.) 369, 382; *Zeisweiss v. James*, 63 Pa. St. 465.

⁴ *Per Lord Brougham*, in Atty.-Gen. *v. Ironmongers' Co.*, 2 Myl. & K. 576.

§ 348. **The Cy Pres Doctrine. Prerogative Cy Pres.** — Applied thus as merely a liberal rule of construction — and in this country such only is its application — the *cy pres* doctrine is a beneficent and commendable principle. It is well that equity thus sees to it “that property devoted to a charitable and worthy object, promotive of the public good, shall be applied to the purposes of its dedication, and protected from spoliation and from diversion to other objects.”¹ But a practice, which is unfortunately called by the same name and is at first sight similar to this, has prevailed in England in such a manner as to cause some adverse criticism of the *cy pres* doctrine on both sides of the Atlantic. That practice is the application of what has been called the *prerogative cy pres* doctrine, to distinguish it from the judicial *cy pres* above described.² Much of the prerogative power of the king, as *parens patriæ* was delegated, under the sign manual of the crown, to the Court of Chancery; and included within this is the authority to regulate and administer a charitable use, even for a purpose *entirely different* from that contemplated by the settler, or when the attempted gift is in itself incomplete, impracticable, or even illegal. Under this sweeping authority, for example, the court took a gift declared to be for a Jews’ synagogue, which under the law of England was illegal, and applied it to the benefit of a foundling hospital.³ This was not an attempt to carry out testamentary intent, though it professed to be such, but an exercise of arbitrary administrative power such as no court in this country could ever possess. “From a few grotesque cases like this,” says Mr. Perry, “discredit has been thrown upon the whole doctrine of *cy pres*.”⁴ The clear distinction, however, between the English *prerogative cy pres*, as an administrative power

¹ Per Justice Bradley, in the *Mormon Church Case*, *The Latter Day Corp.*, etc. *v.* *United States*, 136 U. S. 1, 51.

² 2 Perry on Trusts, §§ 718, 727; Story’s Eq. Jur. § 1168; Bispham’s Prin. Eq. § 128.

³ Story’s Eq. Jur. § 1168; 1 Amer. Law Reg. (N. S.) 400, 401.

⁴ 2 Perry on Trusts, § 728. The fact that both forms of *cy pres* were administered by the same court — the Court of Chancery — led to confusion, which it took some time to remove. “I have

conversed with many persons upon it,” said Lord Eldon, “and I have found great difficulty in the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that when there is a general indefinite purpose not fixing itself upon any object, the disposition is in the king by sign-manual; but where the execution is to be by a trustee with general or some objects pointed out, then the court will take the administration of the trust.” *Moggridge v. Thackwell*, 7 Ves. 36.

there delegated to the Court of Chancery, and the *judicial cy pres*, as a rule of construction applied by courts of equity both there and here, has come to be generally understood; and the former criticisms of the latter kind of *cy pres*, which resulted chiefly from a failure to apprehend that distinction, have consequently lost most of their force.¹ When the gift, as originally made, is legal and feasible, and no intent is manifested to restrict it to the one special charity named, and nothing but a subsequent change of circumstances or conditions prevents it from being literally applied to that particular charity, it is well that our courts of equity can save the property for some kindred public beneficence. And this will be done, even when there is in the will a residuary clause which might otherwise include the property in question, unless the testator has made clear his wish that on failure of the particular charity it shall fall into the residuum.²

§ 349. **Approval of Judicial Cy Pres in this Country.** — The judicial *cy pres* doctrine has met with general, though not universal, favor in the United States. It was at one time apparently repudiated by the Supreme Court of the United States,³ but is now adopted by that tribunal.⁴ The courts of Massachusetts have upheld and most lucidly explained it;⁵ and those of the other New England states have generally followed in their lead.⁶ In Maryland, Virginia, West Virginia, South Carolina, Tennessee, Alabama, Texas, and Wisconsin, it has been expressly repudiated.⁷ Before 1893, it could not

¹ *Jackson v. Phillips*, 14 Allen (Mass.), 539; *Mormon Church Case*, 136 U. S. 1, 51; *White v. White* (1893), 2 Ch. 41; 2 *Perry on Trusts*, §§ 723-728; *Bispham's Prin. Eq.* §§ 128, 129.

² *Mayor of Lyons v. Advocate General of Bengal*, L. R. 1 App. Cas. 91; *Ironmongers' Co. v. Atty.-Gen.*, 10 Cl. & Fin. 908.

³ *Fountain v. Ravenel*, 17 How. (U. S.) 369.

⁴ *The Late Corp. of The Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1, 150 U. S. 145; *Lorings v. Marsh*, 6 Wall. (U. S.), 337; *Hopkins v. Grimshaw*, 165 U. S. 342, 353.

⁵ *Jackson v. Phillips*, 14 Allen (Mass.), 539; *Cary Library v. Bliss*, 151 Mass. 364; *Darcy v. Kelley*, 153 Mass.

433; *Atty.-Gen. v. Briggs*, 164 Mass. 561. Compare *Teele v. Bishop of Derry*, 168 Mass. 341.

⁶ *Doyle v. Whalen*, 87 Me. 414; *Howard v. Amer. Peace Soc.*, 49 Me. 288, 302; *Adams Female Academy v. Adams*, 65 N. H. 225; *Brown v. Concord*, 33 N. H. 285, 296; *Burr v. Smith*, 7 Vt. 241; *Hayden v. Conn. Hospital*, 64 Conn. 320; *Kelly v. Nichols*, 18 R. I. 62.

⁷ *Trustees v. Jackson Square Church*, 84 Md. 173; *Halsey v. Convent P. E. Church*, 75 Md. 275; *Provost of Dumfries v. Abercrombie*, 46 Md. 172; *Baptist Ass'n v. Hart's Ex'rs*, 4 Wheat. (U. S.) 1; *Gallego's Ex'rs v. Atty.-Gen.* 3 Leigh (Va.), 450; *Mong v. Roush*, 29 W. Va. 119; *Johnson v. Johnson*, 92 Tenn. 559; *Festorazzi v. St. Joseph's*

operate as a principle of construction in New York, because charitable uses were not permitted.¹ But it probably returned with the restoration of that form of trust in 1893; and it was specifically recognized and regulated by statute in 1901.² (a) Some doubts have been expressed by the courts of New Jersey as to its existence in that state.³ But it seems to be safe to conclude that it is an operative rule there,⁴ and in the other states of the Union, except as above specified.⁵

Similar to the *cy pres* doctrine is another principle for the disposition of charitable funds, that, unless the testator's intention is clearly to the contrary, if the fund from any cause produce more income than is specifically devoted to the designated charity, the surplus will not result to the settler's heirs, but will also be devoted to the same or a similar charitable object.⁶ But the context and circumstances must always be first carefully weighed, to make sure that the testator has not expressed a contrary intention.⁷

§ 350. **Third. Charitable Trusts generally unaffected by Rules against Perpetuities and Accumulations.** — The rule against perpetuities, which at common law forbids the tying up of property or taking it out of the market for more than any number of lives in being, and twenty-one years and a fraction over (the

(a) After being disallowed in New York at least after 1829, and probably after 1788, the *cy pres* doctrine was explicitly restored by L. 1901, ch. 291, amending the act which restored charitable uses (L. 1893, ch. 701, now L. 1896, ch. 547, § 93). The *cy pres* principle is thus authorized to be applied by order of the Supreme Court, "provided, however, that no such order shall be made until the expiration of at least twenty-five years after the execution of the instrument" (by which the gift is made), "or without the consent of the donor or grantor of the property, if he be living." See also note on New York express trusts, at the end of this chapter.

Catholic Church, 104 Ala. 327; Heidenheimer v. Bauman, 84 Tex. 174; McHugh v. McCole, 97 Wis. 166; Fuller's Will, 75 Wis. 431; *In re Hoffman's Estate*, 70 Wis. 522.

¹ Bascom v. Albertson, 34 N. Y. 584; Holmes v. Mead, 52 N. Y. 332.

² N. Y. L. 1901, ch. 291.

³ Thomson's Ex'rs v. Norris, 20 N. J. Eq. 489, 522; Atty.-Gen. v. Moore's Ex'rs, 19 N. J. Eq. 503.

⁴ Livesey v. Jones, 55 N. J. Eq. 204, 56 N. J. Eq. 453.

⁵ Cases cited in preceding notes on

the *cy pres* doctrine; Perry on Trusts, §§ 728, 729, and notes; Bispham's Prin. Eq. § 130.

⁶ Thetford School Case, 8 Rep. 130 b, by the name of which this principle is generally known. Atty.-Gen. v. Dean of Winsor, 8 H. L. Cas. 369; Atty.-Gen. v. Wax Chandlers' Co., L. R. 8 Eq. 452; Mayor of Beverly v. Atty.-Gen., 6 H. L. Cas. 310; Girard v. Philadelphia, 7 Wall. (U. S.) 1; 2 Perry on Trusts, § 725; Hill on Trustees, 129; 2 Redfield on Wills, 796.

⁷ 2 Perry on Trusts, § 725.

fraction being limited by the period of gestation of a child), has been already mentioned as restricting the operation of private trusts.¹ The discussion of that rule in detail is best postponed to a subsequent chapter. It will suffice here to emphasize the fact that charitable trusts are not ordinarily affected by that rule. They may continue perpetually for the raising of income and disbursing it for public utility, or for accumulating income for any length of time and then applying the accumulations to charitable objects.² This is a very essential feature, which gives much of their effectiveness to most charitable donations. For gifts of this kind are of course most useful when they are unrestricted as to time.

If, however, a charitable devise be made to precede or follow a private trust or other private gift, the rule against perpetuities may interfere with the working out of the scheme in whole or in part.³ Thus, when a private trust is attempted to be made for longer than the legal period, and provision is added for a charitable use to follow it, since the first part is invalid, and the other depends upon it, the entire scheme must fail.⁴ Again, if a trust for charity be made, to continue during lives not yet in being, and a private gift follow, although the charity may be sustained, since there is nothing illegal ahead of it, the rest of the attempted settlement will be inoperative.⁵ But a charitable donation, with no other gift preceding it, may be made to begin at any time in the distant future.⁶ And a fund may be made to shift from one charity to another in the future, no matter how remote.⁷

¹ § 308, *supra*; Duke of Norfolk's Case, 3 Ch. Cas. 20; 1 Perry on Trusts, § 384.

² Hopkins v. Grimshaw, 165 U. S. 342, 355; St. Paul's Church v. Atty.-Gen., 164 Mass. 188; Allen v. Stevens, 161 N. Y. 122; Abend v. End Fund. Commission, 174 Ill. 96; Andrews v. Andrews, 110 Ill. 222; Sellers Church's Petition, 139 Pa. St. 61, 67; Mills v. Davison, 54 N. J. Eq. 659; Brown v. Meeting St. Baptist Soc., 9 R. I. 177; 1 Perry on Trusts, § 384; 2 Perry on Trusts, §§ 736, 737.

³ Hopkins v. Grimshaw, 165 U. S. 342, 355; *In re Tyler* (1891), 3 Ch. 252; *In re Bowen* (1893), 2 Ch. 491; *In re Nottage* (1895), 2 Ch. 649; Mills v. Davison, 54 N. J. Eq. 659; Alden v.

St. Peter's Parish, 158 Ill. 631; Webster v. Morris, 66 Wis. 366; Duggan v. Slocum, 92 Fed. Rep. 806, 808.

⁴ Company of Pewterers v. Christ's Hospital, 1 Vern. 161; Atty.-Gen. v. Downing, Ambler, 550; Post v. Rohrbach, 142 Ill. 600; Hopkins v. Grimshaw, 165 U. S. 342, 355.

⁵ Hopkins v. Grimshaw, 165 U. S. 342, 355; Mills v. Davison, 54 N. J. Eq. 659; Alden v. St. Peter's Parish, 158 Ill. 631.

⁶ Hopkins v. Grimshaw, 165 U. S. 342, 355; Atty.-Gen. v. Downing, Ambler, 550; Inglis v. Sailor's Snug Harbor, 3 Pet. (U. S.) 99; Sanderson v. White, 18 Pick. (Mass.) 328, 336.

⁷ Leming's Estate, 154 Pa. St. 209; McDonogh's Ex'rs v. Murdock, 15 How.

NEW YORK EXPRESS TRUSTS.

Until January 1, 1830, the law of uses and trusts as above explained prevailed in New York, in all respects except as to gifts for charity. On that day, the Revised Statutes, the preparation of which was begun by revisers appointed in 1827, and which were enacted by the legislature of 1829, went into operation. These made many important changes in the New York law of real property, most of which have proved beneficial. But probably in no other department of the state's jurisprudence were the alterations effected by them so radical and far-reaching as in that of uses and trusts. The objects of those alterations, as stated by the revisers in their report to the legislature, were to remove as far as possible the inconveniences which had grown up around these forms of interests as they were dealt with by courts of equity, — especially the difficulties arising out of the existence of both a legal estate and an equitable one in the same piece of property, — and yet to retain the old system for cases in which "the purposes of the trust require that the legal estate shall pass to the trustee," or in which justice or the best interest of the parties concerned can be thereby most fully and fairly subserved. In their efforts to produce these results, the revisers found it necessary to retain unchanged all the species of implied trusts except one. The modifications which they made in that one will be explained hereafter in discussing the first form of resulting trusts.

Dividing all express trusts into their two natural classes, — (a) active and (b) passive, — they abolished the latter class entirely, retained four kinds or groups of the former class, and changed all other forms of otherwise valid, active, express trusts, except those four, into *powers in trust*. Each of these statutory modifications of the express trusts requires a more detailed discussion. And this will include a fuller explanation of the vicissitudes through which charitable uses and donations have passed in New York.

1. *Passive Express Trusts are wholly Abolished.* — For, said the revisers: "They answer no end whatever but to facilitate fraud, to render titles more complicated, and to increase the business of the Court of Chancery. They are, in truth, *precisely what uses were before the Statute of Uses, and are liable to many of the same objections*. Formal" (passive express) "trusts we, therefore, propose to abolish by converting those which now exist into legal estates and prohibiting their creation in the future. This is substantially to carry the Statute of Uses into effect according to its original intention." This purpose was carried out by the statutes which were 1 R. S. 727, §§ 45–50, and which are now Real Prop. Law (L. 1896, ch. 547), §§ 70–73, and are quoted in full in note (a), § 331, *supra*. But it is to be carefully noted that these statutes abolished passive express trusts, not by declaring attempts to create them to be illegal, improper, or a nullity, but by vesting the legal estate in the person designated as the ultimate beneficiary, — by *executing* the use, and the use upon a use, if one be made, and the use upon that, if such subsequent use exist, and so on to the person or persons who are the real beneficiaries. In other words, these

(U. S.) 367, 415; Storrs' Agr. School v. 17 R. I. 265; 2 Perry on Trusts, §§ 736, Whitney, 54 Conn. 342; Almy v. Jones, 737.

statutes have overcome the effect of the decision in Tyrrel's Case, and execute all the uses (or passive express trusts) attempted to be made, whether they are first, second, third, or more remote. Thus, if land be conveyed to A, in trust for B, to the use of C, the statute passes the legal estate to C; and A and B get nothing: and a transfer to A, for the use of B, for the use of C, in trust for D, for the benefit of E, gives the legal estate to E, and nothing to A, B, C, or D. *Wendt v. Walsh*, 164 N. Y. 154; *Hopkins v. Kent*, 145 N. Y. 363; *Townshend v. Frommer*, 125 N. Y. 446, 456; *Woerz v. Rademacher*, 120 N. Y. 62, 67; *Syracuse Sav. Bk. v. Holden*, 105 N. Y. 415; *Mott v. Ackerman*, 92 N. Y. 539; *Adams v. Perry*, 43 N. Y. 487; *Fisher v. Hall*, 41 N. Y. 416; *Downing v. Marshall*, 23 N. Y. 366, 379; *Matter of Gawne*, 82 App. Div. 374; *Ramsay v. De Remer*, 65 Hun, 212; *Knight v. Weatherwax*, 7 Paige, 182.

2. *Of the Active Express Trusts, Four purposes or groups were retained in 1830, to which a fifth one was added in 1893; and the rest, when otherwise valid, are changed into powers in trust.* — The object of the revisers was that there should be no express trusts in real property, except where it is necessary for the protection of those interested that the title or possession shall be vested in a trustee. "Where no such necessity exists," say the revisers (as where the trust is to convey, or to make partitions, etc.), "it is obvious that without giving any estate to the trustee, the trust may as well be executed as a power." See *Clapp v. Byrnes*, 3 N. Y. App. Div. 284, 292; *Heermans v. Robertson*, 64 N. Y. 332. That is, there is not to be a legal estate separate from the beneficial enjoyment of the property, where this can be properly avoided, but in such cases trust duties in connection with the land are to be performed by the donee of a power in trust, *who as such donee has no title or estate*. The statute, which in 1830 was 1 R. S. 728, § 55, and is now Real Property Law (L. 1896, ch. 547), § 76, accordingly provides that: "An express trust may be created for one or more of the following purposes: (1) To sell real property for the benefit of creditors; (2) To sell, mortgage, or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon; (3) To receive rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto; (4) To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits prescribed by law." These four purposes do not embrace charitable uses. But the statute, which was originally L. 1893, ch. 701, and is now Real Property Law (L. 1896, ch. 547), § 93, provides for, (5) A trust "for religious, educational, charitable, or benevolent uses." And by the statute, 1 R. S. 729, §§ 58, 59, as it was in 1830, which is now Real Property Law (L. 1896, ch. 447), § 79, it is enacted that, "Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article" (§ 93, which restored charitable uses, being a later amendment, is treated as though it were a preceding section), no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a *power in trust*, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of

the trust as a power." The statutes do not specify or limit the purposes which are lawful as powers in trust, except by showing that they include those for which active express trusts were valid under the common law, and which are not embraced within the *five express trust purposes* still permitted. *Downing v. Marshall*, 23 N. Y. 366, 380; *Read v. Williams*, 125 N. Y. 560, 569; *Reynolds v. Denslow*, 80 Hun, 359. In all cases of doubtful construction, — where it is not practically certain that one of the five express trust purposes is intended, — the courts lean towards a power, rather than a trust. *Steinhardt v. Cunningham*, 130 N. Y. 292, 300; *Cassagne v. Marvin*, 143 N. Y. 292; *Forster v. Winfield*, 142 N. Y. 327; 332; *Bates v. Lidgerwood Mfg. Co.*, 130 N. Y. 200. See *Robinson v. Adams*, 81 N. Y. App. Div. 20. A few remarks are needed, which apply to all of the five groups of express active trusts; and then each of those groups is to be briefly considered.

The better and more consistent view is that the legislature did not first abolish all express trusts and then create *de novo* five groups, which must rest entirely upon the statutes for their authority and precedents; but it retained in the first instance four groups (and subsequently restored a fifth), which were known and favored at common law, and converted the others into powers in trust. Therefore, except in so far as they are positively modified by the statutes, those trusts which remain are to have their effect and operation determined by the principles of the common law. *Leggett v. Perkins*, 2 N. Y. 297, 307; *Boese v. King*, 78 N. Y. 471, 478; *Downing v. Marshall*, 23 N. Y. 366, 377. But see *Hawley v. James*, 16 Wend. 61, 148. Again, in the third (3) and fourth (4) groups one of the expressed purposes of the trusts is that the trustee may collect the rents, profits, and income of the property. If a trust of the first (1) or second (2) group be attempted to be made by *devise* for the purpose of selling or mortgaging the property, it results only in a power, unless the trustee is also authorized to collect the rents and profits until the sale or mortgage is made. Such is the effect of the statute, which in 1830 was 1 R. S. 729, § 56, and is now Real Property Law (L. 1896, ch. 547), § 77, and which is as follows: "A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power." *Heermans v. Robertson*, 64 N. Y. 332; *Heermans v. Burt*, 78 N. Y. 259; *Knox v. Jones*, 47 N. Y. 389. Therefore, in order to create one of these first four active express trusts, the purpose must be one of those prescribed by the statute, and, as a general rule, the trustee must have authority to receive the rents and profits of the property. *Holly v. Hirsch*, 135 N. Y. 590; *Brewster v. Striker*, 2 N. Y. 19; *Cooke v. Platt*, 98 N. Y. 35; *Tobias v. Ketcham*, 32 N. Y. 319. The statute (in 1830, 1 R. S. 729, § 60, now Real Prop. Law, § 80) also declares that; "Except as otherwise prescribed in this chapter, an express trust, valid as such in its creation, shall vest in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary shall not take any legal estate or interest in the property, but may enforce the performance of the trust." The effect of this is that all the title and estate vest in the trustee; and the *cestui que trust* has only a *right* to compel the proper carrying out of

the trust. *Marx v. McGlynn*, 88 N. Y. 357; *Bennett v. Garlock*, 79 N. Y. 302, 317; *Van Cott v. Prentice*, 104 N. Y. 45, 53; *People ex rel. Short v. Bacon*, 99 N. Y. 275; *Marvin v. Smith*, 46 N. Y. 571; *Briggs v. Davis*, 21 N. Y. 574, 577; *De Graw v. Classon*, 11 Paige, 136, 140. But the trustee himself takes no greater interest in the property than is necessary to perform the requirements of the trust. Thus, if the trust be for the life of A, on A's death the property freed from the trust to pass to B, the estate of the trustee is only during the life of A. *Losey v. Stanley*, 147 N. Y. 550, 568; *Matter of Brown*, 154 N. Y. 313; *Matter of Tompkins*, 154 N. Y. 634; *Brown v. Richter*, 25 N. Y. App. Div. 239; *Knowlton v. Atkins*, 134 N. Y. 313, 317; *Townshend v. Frommer*, 125 N. Y. 446, 455; *Manice v. Manice*, 43 N. Y. 303, 363. The statute also adds (Real Prop. Law, §§ 81, 82, formerly 1 R. S. 729, §§ 61, 62): "The last section" (§ 80 which vests the entire trust interest in the trustee, as shown above) "shall not prevent any person, creating a trust, from declaring to whom the real property, to which the trust relates, shall belong, in the event of the failure or termination of the trust, or from granting or devising the property subject to the execution of the trust. Such a grantee or devisee shall have a legal estate in the property, as against all persons, except the trustees, and those legally claiming under them." "Where an express trust is created, every legal estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to, the person creating the trust or his heirs." The alienability of express trusts of the third (3) and fourth (4) groups is restricted by §§ 83-87 Real Property Law, which were formerly 1 R. S. 730, §§ 63-65, and L. 1895, ch. 886. These statutes provide that, "The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person can not be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust may be transferred." § 83; *Dyett v. Central Trust Co.*, 140 N. Y. 54, 65. "If the trust is expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustee in contravention of the trust, except as provided in this section, shall be absolutely void." § 85. But the trustee may lease the property for not longer than five years at a time without permission of the court; and, for reasons shown which convince the court that it is for the best interest of the estate or beneficiary, he may be empowered by it to lease for a longer term than five years, or to mortgage or sell the trust property or any part of the same. The procedure, upon the application for such authority, is prescribed by § 87. A beneficiary's trust interest which he may alien [i. e., in a trust of the first (1) or second (2) group] may be reached in equity by his creditors. But, as heretofore explained, the income of a beneficiary of one of the third (3) or fourth (4) groups can not be taken for his debts, except so much thereof as is not needed for the education and support of himself and those dependent on him, unless the debt is for necessities sold, or domestic servants' wages, or for services for salary, as explained in note (a), § 335, *supra*.

The history and importance of the New York express trusts call for a brief, separate discussion of each of the above-named five groups of those that are active in character and that have been collectively explained:—

(1) *A trust, "To sell real property for the benefit of creditors."*—An assignment for the benefit of creditors makes a trust of this class. It must

be absolute and imperative in character, vesting no discretion in the trustee, except as to the time and manner of selling. And the direction to sell must be the primary, if not the sole, purpose of the transfer. *Steinhardt v. Cunningham*, 130 N. Y. 292, 300; *Henderson v. Henderson*, 113 N. Y. 1, 11; *Woerz v. Rademacher*, 120 N. Y. 62; *Cooke v. Platt*, 98 N. Y. 35. See New York General Assignment Act of 1877 (L. 1877, ch. 466, now found in R. S. 9th ed. p. 2429), and treatises on general and insolvent assignments.

(2) *A trust, "To sell, mortgage, or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon."* — In comparing this with the first group, it will be observed that the only trust that can be made for the benefit of creditors is one to sell, unless their claims are charged upon the land, as in the form of a mortgage, judgment, or other lien. *Darling v. Rogers*, 22 Wend. 483; *Hawley v. James*, 16 Wend. 61, 149; *Irving v. De Kay*, 9 Paige, 521, 529. Payments to volunteers — annuitants and other legatees — may await the possibly slower process of raising money by mortgage or lease. The primary, if not the only, purpose of this second form of trust must be to sell, mortgage, or lease for one or both of the two purposes specified by the statute. *Heermans v. Burt*, 78 N. Y. 259, 265; *Russell v. Hilton*, 80 N. Y. App. Div. 178. If the trustee be instructed to lease the land, or continue an existing lease, and apply the rents to the payment of an existing mortgage or other lien on the land, this is invalid, since it orders an accumulation for a purpose not authorized by the statute. *Hascall v. King*, 162 N. Y. 134. See also the discussion, in this note, of the fourth group of active express trusts (4), *infra*. If the trustee be directed or authorized to lease for one of the purposes permitted by the statute, he may make a lease for any reasonable length of time required for the proper performance of the trust, even though the term of such lease be longer than the time during which the trust is to continue. *Bennett v. Garlock*, 79 N. Y. 302; *Matter of McCaffrey*, 50 Hun, 371; *Greason v. Keteltas*, 17 N. Y. 491; *Taylor on Landlord and Tenant*, §§ 130-132; *Wood on Landlord and Tenant*, §§ 165-167.

(3) *A trust, "To receive rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto."* — The life "of any person" is here mentioned as though only one person were intended. But such a trust may continue during the lives of not more than two persons in being at the time of its creation, i. e., in being when the deed is delivered, if it be made by deed, or when the testator dies, if by will. Thus, the trust may be to receive the rents and profits and apply them to the use of A while he lives, and then to the use of B while he lives; or to the use of A and B during their joint lives, and then to the use of the survivor of them during the rest of his life. Or there may be a valid trust to receive the rents and profits, while A and B or either of them lives, and apply them to the benefit of any number of designated persons during that period. So, of course, the trust may be to apply the income to the use of A until he is forty years of age, if he live that long, or for any other portion of one or two lives. But, since ordinarily in such cases neither the beneficiary, nor the trustee, nor both together, can sell the property during the period prescribed by the trust, the tying up of the property in this way, or

this suspension of the power of alienation, is not allowed to transcend the period of two lives in being. *Manice v. Manice*, 43 N. Y. 303; *Smith v. Secor*, 157 N. Y. 402; *Allen v. Allen*, 149 N. Y. 280. It was at one time supposed by some that this form of trust was designed merely for persons who were legally incapable of managing their own affairs. But, while such persons are of course very frequently the beneficiaries, it was long ago settled that such trusts may exist for persons *sui juris* and legally capacitated to act for themselves. *Leggett v. Perkins*, 2 N. Y. 297, 308, 321; *Moore v. Hegeman*, 72 N. Y. 376, 384; *Gott v. Cook*, 7 Paige, 521, 538. This is the species of trust by which settlements for married women are frequently made in New York. *L'Amoreaux v. Van Rensselaer*, 1 Barb. Ch. 34, 37.

(4) *A trust, "To receive the rents and profits of real property and to accumulate the same for the purposes, and within the limits, prescribed by law."* — The "limits, prescribed by law," to a trust of this character are that it can not begin before the birth of the beneficiary, and must begin within the time limited for the vesting of future estates; it must terminate at or before the expiration of his minority, and if it be directed to continue for a period beyond his minority, it is void only as to the time beyond such minority; it can not be for the benefit of any person other than the child by whose minority it is measured. Real Prop. Law, § 51; *Pray v. Hegeman*, 92 N. Y. 508; *Smith v. Parsons*, 146 N. Y. 116, 120; *Cook v. Lowry*, 95 N. Y. 103; *Hascall v. King*, 162 N. Y. 134.

(5) *A trust "for religious, educational, charitable, or benevolent uses."* — The English Statute of Charitable Uses (43 Eliz. ch. 4) was abrogated in New York by the general repealing clause of the Law of 1788, ch. 46. 2 Jones & Varick, 282; *Levy v. McCartee*, 6 Pet. (U. S.) 102, 110; *Beekman v. Bonsor*, 23 N. Y. 298, 307. Before that time, although there were very few charitable foundations in the state, those which did exist were governed by the rules and principles of trusts for charity, as these had been developed and explained by the English courts. It was believed, without question, at that time, that those rules and principles were wholly based upon the Statute of Elizabeth. And, therefore, after much vacillation by the courts, the final judicial opinion is that the repeal of that statute is conclusive evidence of an intention on the part of the legislature to abolish for New York the entire English law of charitable uses. *Holland v. Alcock*, 108 N. Y. 312, 334; *Bascom v. Albertson*, 34 N. Y. 584, 601; *Levy v. Levy*, 33 N. Y. 97, 112; *Yates v. Yates*, 9 Barb. 324; *Ayres v. M. E. Church*, 3 Sand. Ch. 351. The Revised Statutes, which went into operation January 1, 1830, provided for only the four groups of express trusts heretofore explained in this note. And the question was very soon mooted whether or not they had left or created any room for charitable uses. In a line of decisions, of which *Williams v. Williams*, 8 N. Y. 525, is the chief, and which were supported by the opinions of such jurists as Chancellors Kent, Jones, and Sandford, it was held that the English system of charities, and the jurisdiction of the Court of Chancery over them became the law of New York on the adoption of the Constitution of 1777, and that neither the repeal of the Statute of Elizabeth nor the operation of the Revised Statutes of the state had done away with that law or system. *Coggeshall v. Pelton*, 7 Johns. Ch. 292; *McCartee v. Orphan Asylum*, 9 Cow. 437, 451; *Shotwell Executor v. Mott*, 2 Sand. Ch. 46; *Hornbeck's*

Ex'r v. American Bible Soc., 2 Sand. Ch. 133; *Trustees of N. Y. Protestant Episcopal School v. Davis*, 31 N. Y. 574, 589; *Iseman v. Mayers*, 26 Hun, 651, 657. But subsequently judicial opinion on these matters turned the other way; and, after oscillating for several years, was completely reversed. In 1873, the Court of Appeals announced that the long controversy was definitely settled, and that the system of charitable uses, as it existed in England, had disappeared from the jurisprudence of New York on the first day of January, 1830, if not before. *Bascom v. Albertson*, 34 N. Y. 584; *Holmes v. Mead*, 52 N. Y. 332; *Holland v. Alcock*, 108 N. Y. 312, 336; *People v. Powers*, 147 N. Y. 104. See also *Downing v. Marshall*, 23 N. Y. 366; *Levy v. Levy*, 33 N. Y. 97, 134; *Ayres v. Trustees of M. E. Church*, 3 Sand. Ch. 351.

Beginning probably as far back as the Law of 1784, chapter 18 (1 Greenleaf's Laws, 71; 1 Jones & Varick, 104), which was an act to enable religious institutions to appoint trustees who should become *bodies corporate*, the state of New York was, in the mean time, developing a distinct scheme for the manipulation of charitable gifts; which scheme, although essentially as ancient as the charities created before there were any statutes of mortmain, and although it was completed here as a system in 1830, was not thoroughly understood until many years after the Revised Statutes became operative. The basal idea of this substituted policy was *corporate charity*, — the making of charitable gifts to corporations so organized, or to be so organized, as to accomplish the desired objects, rather than to trustees for the purposes intended. Thus, when the property was designed for religious purposes, it was to be given directly to a church corporation, or other religious corporate entity, and not to trustees to hold and manage for such institution; and when it was intended for purely eleemosynary purposes, it was to be given to some incorporated asylum, hospital, or the like, and not to individuals in trust for the same. And if the desired charity were not already in corporate form, there were to be directions in the instrument of gift for having it made so, within the time permitted by the statutes (two lives in being), and then transferring to it the donated property. These gifts were then sustained upon the theory of the absence of a technical trust, and the absolute ownership of the property by the charitable corporation. *Bird v. Merkle*, 144 N. Y. 544; *Riker v. Lee*, 115 N. Y. 93, 133 N. Y. 519; *Cottman v. Grace*, 112 N. Y. 299, 306; *Wetmore v. Parker*, 52 N. Y. 450; *Bascom v. Albertson*, 34 N. Y. 584, 609; *Levy v. Levy*, 33 N. Y. 97, 124. The corporation must fulfill the purposes of its existence; and it owed to the state a fiduciary obligation to do so. The state so far forth insured the performance of the wish of the donor, by its laws relating to the administration of corporate property. There was, therefore, in every such charity a trust relationship, consisting of the duty of the corporation properly to administer its funds; and the individuals who were to be the ultimate beneficiaries were necessarily indefinite. *But the donor created no trust.* He gave his property absolutely to a definitely described and known corporation. The duty and the trust were impressed upon the gift by the state. The time of the existence of the beneficence of the donor, moreover, must depend on that of the corporation, which might or might not be perpetual. Thus the donor must choose a definite object to which to give both the legal and equitable estates, and could not always make his charitable donation to last forever. *Fosdick v. Town of*

Hempstead, 125 N. Y. 582, 595; Matter of Ingersoll, 131 N. Y. 573; Bird v. Merkle, 144 N. Y. 544; Holland v. Alcock, 108 N. Y. 312; Bascom v. Albertson, 34 N. Y. 584. He might pass the property to the definite object, by means of a power in trust reposed in a third party, such, for example, as an executor, provided he required the power to be executed within the time permitted by the statutes — two lives in being. Thus, he could authorize his executors to distribute the property among known and clearly described existing charities, Power v. Cassidy, 79 N. Y. 602, or to have a corporation formed, within two lives in being, for definitely described charitable objects, and then to convey the property absolutely to such corporation. Tilden v. Green, 130 N. Y. 29. It was required that the corporations to so take and hold, whether directly from the donor or through the act of the donee of a power in trust, should be so definitely and unmistakably pointed out by the instrument, that they could come into court as unquestionably the only beneficiaries intended and move it to compel the transfer of the property to them. People v. Powers, 147 N. Y. 104; Tilden v. Green, 130 N. Y. 29; Fosdick v. Town of Hempstead, 125 N. Y. 582, 591. Therefore the *cy pres* doctrine had no application to such gifts. It was repeatedly declared that that doctrine did not exist in either of its forms in the state of New York. Owens v. Miss. Soc. M. E. Church, 14 N. Y. 380; Holland v. Alcock, 108 N. Y. 312, 330; Cottmann v. Grace, 112 N. Y. 299, 306; Hillen v. Iselin, 144 N. Y. 365, 374. But if the beneficiary were explicitly indicated, and the settlement otherwise properly made, it was not allowed to fail because of any non-appointment or absence of a trustee or donee of a power in trust. The court, on application of the beneficiary, would follow the legal estate, and see that it was disposed of as required by the donor. Downing v. Marshall, 23 N. Y. 366, 382; Kirk v. Kirk, 137 N. Y. 510, 514; Woodward v. James, 115 N. Y. 346, 357; Rose v. Hatch, 125 N. Y. 427; Greene v. Greene, 125 N. Y. 506.

The difficulties with the scheme for charitable donations, as thus developed in New York, were that it was too rigid and narrow, and too obscure. Testators were constantly desiring and endeavoring to put into operation charitable plans which were not included within its narrow limitations. The provisions of the Revised Statutes themselves did not explain it with any degree of exactness. The best legal minds were long in doubt and perplexity as to what could be done, and what was forbidden, in the way of foundations for charity. The result was the failure of many beneficent schemes for the public good, which might otherwise have flourished forever in this state. See Dammert v. Osborn, 140 N. Y. 30, 43. Some of the conspicuous instances of those abortive attempts to benefit the public are shown in the following cases, namely: Levy v. Levy, 33 N. Y. 97; Bascom v. Albertson, 34 N. Y. 584; White v. Howard, 46 N. Y. 144; Holmes v. Mead, 52 N. Y. 332; Holland v. Alcock, 108 N. Y. 312; Tilden v. Green, 130 N. Y. 29; People v. Powers, 147 N. Y. 104; Fairchild v. Edson, 151 N. Y. 199. In People v. Powers, 147 N. Y. 104, as an illustration, the gift was to the executor named in the will, "to dispose of among the charitable and benevolent institutions or corporations in the city of Rochester, as he shall choose, and in such sums and proportions as he shall deem proper." Since all kinds of charitable institutions in Rochester, whether incorporated or not, came within the meaning of this language, it was decided that the beneficiaries were

clearly too indefinite — there being no fixed charity or class of charities which could undeniably maintain that they alone were intended as donees — and therefore the entire scheme must fail. This case was distinguished from the quite similar one of *Power v. Cassidy*, 79 N. Y. 602, in which a gift was sustained for the charitable Catholic institutions of the city of New York, because it was shown that all such Catholic institutions in New York City were incorporated and therefore definitely known and ascertained. In the more noted case of *Tilden v. Green*, 130 N. Y. 29, the *ninth* and *tenth* paragraphs of the will of Samuel J. Tilden were particularly in question. By the ninth paragraph, the property was given to the executors, with instructions that, during the lives of the testator's nephew and niece, or that of the survivor of them (two designated persons in being), they should caused to be formed a *corporation*, to be known as the "Tilden Trust," for the purpose of establishing and maintaining a free public library in the city of New York, and should then transfer the donated property to it, for that purpose. It was declared by the Court of Appeals that, had he stopped with this ninth paragraph, Mr. Tilden would have made a valid gift of the property, amounting to \$3,000,000, for the "Tilden Trust," yet to come into being. The settlement would have come squarely with the then existing New York scheme for charitable foundations. But the substance of the tenth paragraph of the will was that, if, in the judgment of the executors, it were not best to apply all or any of the fund to the "Tilden Trust," then, in their discretion, they might use any part or all of the same for such other charitable purposes as in their judgment would be "most widely beneficial to the interests of mankind." It was held that the ninth and tenth paragraphs of the will must be read together, and could not be taken separately as constituting two distinct provisions; and that, as so read, they authorized the executors, in their discretion, to give the property to *any* charity or charities in the world, of which the "Tilden Trust" might or might not be one. Testing such a settlement as a trust, it was clearly not within the purview of any of the four active express trusts permitted by the Revised Statutes. Tested as a power in trust, it must fail because of the indefiniteness of the beneficiaries. The scheme was wholly inconsistent with the New York policy as to charities, and, therefore, invalid.

Because of the constantly recurring frustrations of large and splendid devises and bequests for public beneficence, and in particular as an outcome of the overthrow of the Tilden Will, the unfortunate policy, which had existed in New York for at least over half a century without being understood, was abandoned, in 1893, in favor of the restoration of charitable uses as the *fifth* (5) group of active express trusts. This was accomplished by chapter 701 of the Laws of 1893, which is entitled, "*An Act to regulate gifts for charitable purposes.*" In so far as it deals with conveyances and devises of real property, that statute has been re-enacted as § 93 of the Real Property Law. But the following quotation is the complete act, as dealing with all kinds of property, and as amended by the law of 1901, ch. 291, with reference to the *cy pres* doctrine.

"Section 1. No gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects, be valid under the laws of this State, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries

thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest, or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised, or bequeathed for such purposes shall vest in the trustee. If no person be named as trustee, then the title to such lands or property shall vest in the supreme court.

“Section 2. The supreme court shall have control over gifts, grants, bequests, and devises, in all cases provided for by section one of this act. Whenever it shall appear to the court that circumstances have so changed since the execution of an instrument containing a gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such gift, grant, bequest, or devise, shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation, or direction contained therein; provided, however, that no such order shall be made until the expiration of at least twenty-five years after the execution of the instrument or without the consent of the donor or grantor of the property, if he be living. The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the courts.”

Construing this statute liberally, in view of the mischiefs which it was manifestly made to remedy, and with special reference to the purpose for which by its title it is declared to have been enacted, — “*to regulate gifts for charitable purposes*,” — the Court of Appeals has decided that it restored to New York the former and English system of trusts for charity, with their three distinctive characteristics, namely, that the purposes are for public utility, — religious, educational, eleemosynary, or governmental, — they may continue perpetually, and their beneficiaries must be indefinite. *Allen v. Stevens*, 161 N. Y. 122; *Matter of Griffin*, 167 N. Y. 71, 77. And see *Dammert v. Osborn*, 140 N. Y. 30, 43. It is believed, also, as heretofore stated (§ 346, *supra*), that this statute authorizes greater indefiniteness in the beneficiaries than is permitted by the unaided rules of equity. For, by those rules alone, a gift would be invalid if made for general, unidentified, charitable purposes, without the appointment of any trustee to select the specific class of beneficiaries. § 346, *supra*, and authorities there cited. But, by virtue of this statute, it would seem clearly to be the duty of the Attorney-General in such a case to apply to the Supreme Court for the appointment of a trustee, and the duty of the court then to appoint a trustee and order him to select the charity and apply to its use the donated property. Looking at the difficulties which gave rise to the statute, and in particular at the defect in the Tilden Will, this seems to be a logical, if not a necessary, conclusion. But this point remains to be determined by the court of last resort. *Rothschild v. Goldenberg*, 58 N. Y. App. Div. 499. See *Dammert v. Osborn*, 140 N. Y. 30, 43, 141 N. Y. 564; *Allen v. Stevens*, 161 N. Y. 122; *Matter of Griffin*, 167 N. Y. 71, 77; *People v. Powers*, 147 N. Y. 104; *Butler v. Trustees* 92 Hun, 96, 101. Before this statute took effect, it was also settled

that a gift for an unincorporated charitable association could not be sustained, either as a trust or a power. But it is quite clear that that difficulty has been removed, and that donations in trust for such institutions are now sustainable by virtue of the statute. *Downing v. Marshall*, 23 N. Y. 366; *Shipman v. Rollins*, 98 N. Y. 311, 326, 327; *White v. Howard*, 46 N. Y. 144; *Vander Volgen v. Yates*, 3 Barb. Ch. 242, 9 N. Y. 219; *Congregational Unitarian Soc. v. Hale*, 29 N. Y. App. Div. 396.

For the restrictions as to the amount of property which a testator may give to charity by will, see § 344, note (a), *supra*.

b. IMPLIED TRUSTS.

CHAPTER XXII.

(a) RESULTING TRUSTS.

§ 351. Nature and classification of implied trusts.

§ 352. Resulting trusts. Groups.

u. *Trusts resulting from Payment of Purchase Money.*

§ 353. Reasons for and requisites of such trusts.

§ 354. Purchase money paid as such.

§ 355. Trust must result when purchase money is paid.

§ 356. All or aliquot part of purchase price must be paid.

§ 357. Proof of such trusts.

§ 358. Title taken in name of child or wife.

§ 359. Circumstances which may rebut these ordinary presumptions.

§ 360. Statutory abolition of this resulting trust.

β. *Following Trust Funds.*

§ 361. Trusts resulting from purchase of property with trust funds.

§ 362. Property held in fiduciary capacity.

§ 363. Property traced and identified.

§ 364. Rights of innocent purchasers for value.

γ. *Trusts resulting from Failure of Declaration or Object.*

§ 365. Essentials and evidence of such trusts.

§ 366. Effects of residuary clauses in wills.

§ 367. Gifts for charity not apt to cause such resulting trusts.

§ 368. General gift, or gift for specific purpose, as causing such a trust.

δ. *Trusts resulting from Conveyances not expressing any Consideration or Use.*

§ 369. Reasons for such trusts.

§ 370. They arose only from absolute common-law conveyances.

§ 371. Such trusts not now favored.

§ 372. Execution of resulting trusts.

§ 351. **Nature and Classification of Implied Trusts.** — Trusts which arise by implication of law are expressly excepted from the operation of the statutes of frauds of England¹ and the various states of this country.² They are raised and carried into effect, when they are necessary to the production of the

¹ Stat. 29 Car. II. ch. 3, § 8.

² N. Y. Real Prop. Law (L. 1896,

ch. 547), § 207; Stim. Amer. Stat. L § 1710.

best and most equitable results for the interested parties; and, therefore, no requirement as to written proof is allowed to stand in the way of their establishment and operation.¹ In some instances, trusts are implied by equity for the purpose of affording a remedy to injured parties who have *no* redress at law; they are implied in other cases, in order to produce *better* interests and remedies than the law courts can give. They are always the outcome of the courts' endeavor to work out the most complete justice. But under some circumstances, as, for example, where relief is asked for on the ground of fraud, this result is sought to be produced without regard to what the parties to the transaction may have had in mind at the time; while under other circumstances, of which an attempted trust not completely expressed by the instrument is an illustration, the effort of the court is to work out the presumed intention of the parties. In the former class of cases, the trusts are called *constructive*; in the latter *resulting*, or sometimes *presumptive*. The division, however, of all implied trusts into these two classes — *resulting* and *constructive* — is chiefly for convenience in investigation and discussion. Courts and statute makers do not always observe closely the distinction between them, which is here pointed out.² When a trust of either form is found to exist, the ordinary remedy for the *cestui que trust* is a conveyance of the property to himself from the trustee, or a judgment or decree of the court vesting the legal estate in him, or declaring it to be so vested without any conveyance. And it is the remedy or redress with which the parties, courts and law-makers alike are chiefly concerned. Therefore, trusts which arise from fraud or unfair dealing are sometimes spoken of as *resulting*; and the expression, "constructive trusts," is now and then used to include trusts which "result" according to the intention of the parties. But the division here made is the ordinary and logical one; and it affords the best basis for the examination of all the implied trusts. The order in which the two classes will be discussed is, (a) Resulting trusts, in this chapter, and (b) Constructive trusts, in the next.

¹ 1 Perry on Trusts, §§ 85, 86, 124, and notes.

² 1 Perry on Trusts, § 124; Albright v. Oyster, 140 U. S. 493; Dana v. Dana,

154 Mass. 491; Barnes v. Thuet, 116 Iowa, 359; Preston v. Preston, 202 Pa. St. 515; N. Y. Real Prop. Law (L. 1896, ch. 547), § 74.

§ 352. **Resulting Trusts — Groups.** — All the forms of resulting trusts may be conveniently discussed under four headings or groups, namely: *a.* Where the purchase price of property is paid by one person, but the title is taken in the name of another; *β.* Where the holder of trust funds buys property with them and takes title in his own name, without expressing any trust — following trust funds; *γ.* Where a conveyance is made in trust, but the trusts are not declared, or are not wholly declared, or wholly or partly fail; *δ.* Where a transfer of property is made without consideration and without expressing any use or purpose for which the grantee or donee is to take. It will appear in the discussion that the second of these groups is, in reality, a subdivision of the first. But it also has some important distinctive features, which entitle it to be treated separately.¹

Resulting trusts are the modern outgrowth of the ancient resulting uses, through the Statute of Uses and its constructions. The same general principles which gave rise to and governed resulting uses have raised and regulated resulting trusts. It will, therefore, conduce to brevity and clearness to discuss both of those equitable estates together, for they are in all essential features the same, and to point out in passing any of the ways in which they have differed. And it will be observed that it is only in treating of the last, or fourth, group of resulting trusts that any such differences will have to be noted.

a. Trusts resulting from Payment of Purchase Money.

§ 353. **Reason for and Requisites of such Trusts.** — Equity presumes, in the absence of proof to the contrary, that he who pays for property intends to become its owner.² Therefore, when A pays the purchase price of a lot of land, and the title is taken in the name of B, or of B and C either jointly or successively, the land is ordinarily held by him or them in

¹ Some writers make more classes of resulting trusts, some less. Thus, in *Lloyd v. Spillett*, 2 Atk. 148, 150, Lord Hardwicke placed them in not more than three groups. Mr. Perry makes five classes. 1 Perry on Trusts, § 125. And in 2 Lomax, Dig. 200, no less than thirteen divisions are attempted. But all forms of resulting trusts, properly so

called, are embraced within the four groups here described. See Bispham's Prin. Eq. § 79.

² 2 Story's Eq. Jur. § 1201; *Bostleman v. Bostleman*, 24 N. J. Eq. 103. "And this rule," says Mr. Perry, "is vindicated by the experience of mankind." 1 Perry on Trusts, § 126.

trust for A.¹ This is implied from the acts of the parties, and illustrates the most prominent form of resulting trusts. The requisites to its existence are that the whole, or some aliquot part, of the purchase money shall be paid, *as such*,² at or before the time of the purchase, or as a part of the same transaction, by one who does not take the legal estate; as a general rule, that he who so pays shall not be the husband or father of the one who takes the legal title, and that no other circumstances shall indicate an intention on the part of the purchaser to make a gift of the property to the other party. Where these essentials coexist, a trust will be implied in any jurisdiction, except in a few states, such as New York, Michigan, and Wisconsin, where this particular form of resulting trust has been abolished by statute.³ Each of these requisites requires a brief explanation.

§ 354. **The Purchase Money must be paid, as such.** — It must be shown that his funds, in whose favor such a trust is claimed, were employed as such in the purchase.⁴ Accordingly, if one hand money or other funds to his agent with instructions to purchase real property, and the agent buy land therewith, taking title in his own name, a trust results in favor of the principal.⁵ But when an agent, who is employed to purchase realty, not only takes the conveyance in his own name, but also pays the purchase price out of his own funds, whether the principal has advanced money to the agent for that purpose or not, no trust results in favor of the latter.⁶

¹ *Dyer v. Dyer*, 2 Cox, 92; 1 Lead. Cas. Eq. (4th Eng. ed.) 203, which is the leading case; *Sayre v. Townsend*, 15 Wend. (N. Y.) 647; *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582; *Kendall v. Mann*, 11 Allen (Mass.), 15; *Beringer v. Lutz*, 188 Pa. St. 364; *Bickel's Appeal*, 86 Pa. St. 204; *Stratton v. Dialogue*, 14 N. J. Eq. 70; *Cecil Bank v. Snively*, 23 Md. 253, 261; *Moss v. Moss*, 95 Ill. 449; *Carter v. Challen*, 83 Ala. 135; *O'Connor v. Irvine*, 74 Cal. 435; 1 Perry on Trusts, § 126, and cases cited; 2 Story's Eq. Jur. § 1201; *Bispham's Prin. Eq.* § 80; 89 Law Times, 152.

² See following notes, to the discussion of each of these requisites

³ See § 360, *infra*.

⁴ *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405, 408; *Kinimel v. Smith*,

117 Pa. St. 183, 192; *Fox v. Peoples*, 201 Pa. St. 9; *Jacksonville Nat. Bk. v. Beesley*, 159 Ill. 120; *Furber v. Page*, 143 Ill. 622.

⁵ *Church v. Sterling*, 16 Conn. 388; *Robb's Appeal*, 41 Pa. St. 45; *Frank's Appeal*, 59 Pa. St. 190, 194; *Sanfoss v. Jones*, 35 Cal. 481; *Malloy v. Malloy*, 5 Bush (Ky.), 464.

⁶ *Bartlett v. Pickersgill*, 1 Eden, 515; *James v. Smith* (1891), 1 Ch. 384; *Whiting v. Dyer*, 21 R. I. 85; *O'Hara v. Dilworth*, 72 Pa. St. 397, 403; *Fox v. Peoples*, 201 Pa. St. 9; 1 Perry on Trusts, § 135; *Hill on Trustees*, 96; *Sugden, V. & P.* 703. But there are a few decisions in which the opposite view has been taken upon this particular point. See *Follansbe v. Kilbreth*, 17 Ill. 522; *Chastain v. Smith*,

So, when the owner of the money advances it as a loan to the other party, and does not deal with it as *his own purchase money*, no resulting trust can arise.¹ If in instances like those last mentioned any trust at all exist, it must arise as an express trust from the agreement of the parties; and must, therefore, be manifested and proved in writing as required by the Statute of Frauds.²

§ 355. **Trust must result when Purchase is made.**— Such a resulting trust must arise, if at all, at the time when the purchase is made; and all of the consideration, upon the payment of which it is sought to be based, must have been advanced or secured at or before the time of such purchase.³ A payment made after the conveyance, and as a distinct transaction, can not impliedly raise a trust. A purchaser's interest in real property, having once vested absolutely and free from any trust, can not be cut down, and he can not be placed in a fiduciary position in regard to it, merely by the subsequent payment of value to him.⁴

30 Ga. 96; *Hidden v. Jordan*, 21 Cal. 92; *Vallette v. Tedens*, 122 Ill. 607; *Bryan v. McNaughton*, 38 Kan. 98.

¹ *Bartlett v. Pickersgill*, 1 Eden, 515, 1 Cox, 15; *Crop v. Norton*, 9 Mod. 233; *Aveling v. Knipe*, 19 Ves. 441, 445; *White v. Carpenter*, 2 Paige (N. Y.), 217; *Wheeler v. Kirtland*, 23 N. J. Eq. 13, 22; *Kegerreis v. Lutz*, 187 Pa. St. 252; *Jacksonville Bank v. Beesley*, 159 Ill. 120, 125; *Milliken v. Ham*, 36 Ind. 166; *Beecher v. Wilson & Co.*, 84 Va. 813; *Hodges v. Verner*, 100 Ala. 612; *Gibson v. Toole*, 40 Miss. 788. "On the other hand, if one should advance the purchase money and take the title to himself, but should do this wholly on the account and credit of the other, he would hold the estate upon a resulting trust for the other. And if partly on the account and credit of another, he would hold as trustee *pro tanto*." 1 *Perry on Trusts*, & 133 and cases cited, especially *Aveling v. Knipe*, 19 Ves. 441; *Lounsbury v. Purdy*, 18 N. Y. 515; *Marvin v. Brooks*, 94 N. Y. 71. But where a purchase is made on the credit of two persons, and the money is paid by only one of them, there is no resulting trust.

Brooks v. Fowle, 14 N. H. 248; *Walsh v. McBride*, 72 Md. 45. See *Butler v. Rutledge*, 2 Cold. (Tenn.) 4.

² *Gibson v. Foote*, 40 Miss. 788, 792; *Kingsbury v. Burnside*, 58 Ill. 310, 328; *Farnham v. Clements*, 51 Me. 426; *Dyer v. Dyer*, 1 Lead. Cas. Eq. pp. *203, *216. But see *Harrold v. Lane*, 53 Pa. St. 268; *Hall v. Congdon*, 56 N. H. 279; *Brotherton v. Weathersby*, 73 Tex. 471; *Robbins v. Kimball*, 55 Ark. 414.

³ *Dusie v. Ford*, 138 U. S. 587, 592; *Ryder v. Loomis*, 161 Mass. 161; *Champlin v. Champlin*, 136 Ill. 309; *Osgood v. Eaton*, 62 N. H. 512; *Collins v. Carson*, 30 Atl. Rep. (N. J. Eq.) 862; *Levy v. Evans*, 57 Fed. Rep. 677; *Moore v. Moore*, 74 Miss. 59; 1 *Perry on Trusts*, § 133.

⁴ Cases cited in last note. But if the note of the purchaser be agreed on when the deed passes, and be delivered the next day, or soon after, under such circumstances that it can be treated as a part of the transaction of purchasing the land, it will be sufficient to raise a resulting trust. See *Kline v. McDonnell*, 62 Hun (N. Y.), 177.

§ 356. **All, or Aliquot Part, of Purchase Price must be paid.**

— Again, the payment must be of the whole or some definite or aliquot part of the purchase price. And it must be paid as the price of the whole or of that particular part of the property purchased.¹ In a number of cases, the courts have declared that no trust will result from the payment of purchase money, unless the entire price is advanced by him who claims to be *cestui que trust*.² But it seems to be clear that this means the entire price of that which he means to purchase, whether it be a whole tract of land or a distinctly specified but undivided portion of such tract.³ Thus, if A pay \$10,000 as the entire consideration for an acre of land which is deeded to B, and \$5,000 as the entire consideration for one-half of another acre which is deeded to C upon his paying \$5,000 for the other half, B takes the one acre wholly in trust for A, and C holds an undivided one-half of the other acre in trust for A.⁴ But if A hand to B \$5,000 with which to purchase for A a lot of land, whether specified or not, and B purchase the land for \$10,000, or any amount over \$5,000, paying the additional consideration out of his own funds, then, according to the great weight of authority, no trust arises in favor of A.⁵ In the case last supposed, A may have a lien on the land for the \$5,000 of his money which went into the purchase price;⁶ but, since that sum was not advanced for the aliquot part of the land which it purchased, he is not a *cestui que trust* of any portion of the land. But in Pennsylvania, and possibly a few other jurisdictions, a trust may result in favor of any one whose funds pay for any aliquot

¹ Sayre v. Townsend, 15 Wend. (N. Y.) 647; Burke v. Callanan, 160 Mass. 195; Baker v. Vining, 30 Me. 121, 127; Dudley v. Bachelder, 53 Me. 403; O'Donnell v. White, 18 R. I. 659; Wheeler v. Kirtland, 23 N. J. Eq. 13; 22; Reed v. Reed, 135 Ill. 482; Stephenson v. McClintock, 141 Ill. 604; Reynolds v. Morris, 17 Ohio St. 510; Olcott v. Bynum, 17 Wall. (U. S.) 44; Allen v. Caylor, 120 Ala. 251.

² Dudley v. Dudley, 176 Mass. 34; Schierloh v. Schierloh, 148 N. Y. 103; Bryant v. Allen, 54 N. Y. App. Div. 500; Coleman v. Parran, 43 W. Va. 737. See Woodside v. Hewell, 109 Cal. 481.

³ See cases cited in last two preced-

ing notes. Also McGowan v. McGowan, 14 Gray (Mass.), 119; Buck v. Warren, 14 Gray (Mass.), 122; Cutler v. Tuttle, 19 N. J. Eq. 549, 561; 1 Perry on Trusts, § 132.

⁴ Cases cited in last three preceding notes.

⁵ Schierloh v. Schierloh, 148 N. Y. 103; Dudley v. Dudley, 176 Mass. 34; 1 Perry on Trusts, § 132, and cases cited.

⁶ Schierloh v. Schierloh, 148 N. Y. 103; Bryant v. Allen, 54 N. Y. App. Div. 500; Coleman v. Parran, 43 W. Va. 737; Woodside v. Hewell, 109 Cal. 481.

part of land, although they were not advanced for that part, or were used without his knowledge or consent.¹

It follows, from the principles already explained, that, when the purchase money is ratably contributed by several, and the title taken in the name of one of them, or to a stranger, a trust results to them in proportion to the amount advanced by each.² And in some cases, where there was no clear proof of how much was paid by each, it has been presumed that their contributions were equal.³ So, if the payment be made by one, or ratably by two or more, and the title be taken by them and others, or entirely by others who pay nothing, trusts result proportionately for those who make the payments.⁴

§ 357. **Proof of Such Trusts.** — Trusts of this character may be established by any kind of competent evidence, oral or written.⁵ But the requisites here explained must be clearly proved as facts, or no such presumption will be indulged. When the evidence is conflicting or uncertain, no trust will be declared.⁶ Therefore, while parol evidence is admissible even against the answer in chancery of the nominal pur-

¹ *Beringer v. Lutz*, 188 Pa. St. 364; *Kennedy v. McCloskey*, 170 Pa. St. 534. And see *Rouchefoucauld v. Boustead* (1897), 1 Ch. 196, 206, which partly overrules *Bartlett v. Pickersgill*, 1 Eden, 515; *Price v. Reeves*, 38 Cal. 457; *Sanfoss v. Jones*, 35 Cal. 481; *Malloy v. Malloy*, 5 Bush (Ky.), 464.

² *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405, 410; *Union College v. Wheeler*, 59 Barb. (N. Y.) 585; *Warren v. Tynan*, 54 N. J. Eq. 402; *Morey v. Herrick*, 18 Pa. St. 123, 129; *Kelly v. Kelly*, 126 Ill. 550; *Hughes v. White*, 117 Ind. 470; *Case v. Codding*, 38 Cal. 191, 193; *Fulton v. Jansen*, 99 Cal. 587; 1 *Perry on Trusts*, § 132; *Hill on Trustees*, 149. But Lord Hardwicke thought that probably the application of the rule was restricted to a single purchaser. *Crop v. Norton*, 9 Mod. 233. And such were the decisions of a few early cases. See *Bernard v. Bougard*, Harr. Ch. (Mich.) 130, 143; *Coppage v. Barnett*, 34 Miss. 621.

³ *Shoemaker v. Smith*, 11 Humph. (Tenn.) 81; *Edwards v. Edwards*, 39 Pa. St. 369, 386.

⁴ *Rigden v. Walker*, 3 Atk. 731, 735;

Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405; *Quackenbush v. Leonard*, 9 Paige (N. Y.), 334; *Jackson v. Moore*, 6 Cow. (N. Y.) 706; *Buck v. Swazey*, 35 Me. 41; *Purdy v. Purdy*, 3 Md. Ch. 547; *Hall v. Young*, 37 N. H. 134; *Clark v. Clark*, 43 Vt. 685; *Case v. Codding*, 38 Cal. 191.

⁵ Such trusts are expressly excepted out of the Statute of Frauds, 29 Car. II. ch. 3, § 8. It is clear that this was simply in affirmance of the general law; and, since the statutes of frauds of our states do not include implied trusts, they may be established by parol. See Judge Story's opinion in *Hoxie v. Carr*, 1 Sumn. (U. S. Cir. Ct.) 173, 187; *McGuire v. Ramsey*, 4 Eng. (Ark.) 518, 525.

⁶ *Oyster v. Albright*, 140 U. S. 493, 515; *Howland v. Blake*, 97 U. S. 624; *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582; *Beringer v. Lutz*, 179 Pa. St. 1; *Martin v. Baird*, 175 Pa. St. 540; *Baker v. Vining*, 30 Me. 121, 127; *McGinnis v. Jacobs*, 147 Ill. 24; *Jacksonville Nat. Bk. v. Beesley*, 159 Ill. 120; *Pillars v. McConnell*, 141 Ind. 670; *Reed v. Painter*, 129 Mo. 674; *Woodside v. Hewell*, 109 Cal. 481; 1 *Perry on Trusts*, § 137.

chaser, or against the express statements of the deed to him, the testimony to raise a trust against him in such a case must be very clear and strong.¹ The presumption that the parties intended a trust to arise from the payment of purchase money is always rebuttable; and circumstances which show that such was not their intention may also be established by oral testimony as well as by written evidence.² Some of the most important of such circumstances remain to be discussed.

§ 358. **Title taken in Name of Child or Wife.**— When the one who pays the purchase price is the husband or father of the nominal purchaser, or stands *in loco parentis* to him, equity presumes that the payment is a gift to the wife, or an advancement to the child, as the case may be; and therefore no trust ordinarily results from such a transaction.³ The relation between the parties precludes the presumption of a resulting trust, because it is a fair and proper inference that the husband or person standing in the position of parent intends by his purchase to perform the legal or moral obligation of support and maintenance which arises from the relationship.⁴ This clear exception to the general rule as to resulting trusts thus arises from and rests upon the obligation of husband or parent. Therefore, the general rule, and not the exception, applies when one brother, for example, pays for property conveyed to another; and a resulting trust arises,⁵ unless circumstances are proved to have placed him who so pays the consideration in substantially the position of a parent to care for and support his brother.⁶ So, if the father

¹ *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 582; *Page v. Page*, 8 N. H. 187; *Moore v. Moore*, 38 N. H. 382; *Silliman v. Haas*, 151 Pa. St. 52, 63; *Curd v. Brown*, 49 S. W. Rep. 990; *Pinney v. Fellows*, 15 Vt. 525; *Peabody v. Tarbell*, 2 Cush. (Mass.) 226, 232; *Nealand v. Benby*, 69 Tex. 711.

² *Zimmerman v. Barber*, 176 Pa. St. 1; *Swinburne v. Swinburne*, 28 N. Y. 568; *Blodget v. Hildreth*, 103 Mass. 484, 487; *Bush v. Stanley*, 122 Ill. 406; *Salisbury v. Clarke*, 61 Vt. 453; *Kline v. Ragland*, 47 Ark. 111; *Bispham's Prin. Eq.* § 83.

³ *Murless v. Franklin*, 1 Swanst. 13, 17; *Grey v. Grey*, 2 Swanst. 594, 597; *Dyer v. Dyer*, 2 Cox, 93; *Christy v.*

Courtenay, 13 Beav. 96; *Page v. Page*, 8 N. H. 187; *Partridge v. Havens*, 10 Paige (N. Y.), 618; *Kern v. Howell*, 180 Pa. St. 315; *Hallenback v. Rogers*, 57 N. J. Eq. 199; *Doyle v. Sleeper*, 1 Dana (Ky.), 531, 536; *Olipant v. Leversidge*, 142 Ill. 160; 1 *Perry on Trusts*, §§ 143-149; *Bispham's Prin. Eq.* § 84; *Hill on Trustees*, 97.

⁴ *Dyer v. Dyer*, 2 Cox, 92; *Long v. King*, 117 Ala. 423; *Smithsonian Institution v. Meech*, 169 U. S. 398; *Walston v. Smith*, 70 Vt. 19.

⁵ *Maddison v. Andrews*, 1 Ves. Sr. 57; *Edwards v. Edwards*, 39 Pa. St. 369.

⁶ *Bosworth v. Hopkins*, 85 Wis. 50.

be living and able to support the child, a trust will result in favor of the mother who pays for property bought in the child's name. But when the father is dead, or for any other reason the support of the child has devolved upon the mother, her purchase of land for him is presumed to be an advancement.¹ By the weight of authority, also, a purchase in the name of an illegitimate child is *prima facie* an advancement, and raises no trust.² And the prevailing view is now in favor of the same conclusion, when realty is bought by a parent in the joint names of himself and a child or children.³

§ 359. **Circumstances which may rebut these Ordinary Presumptions.** — The relationships of husband and wife and parent and child supply most of the cases in which trusts do not arise from the purchase of property by one person in the name of another; and such cases are commonly said to make *the* exception to the general rule. But it must be remembered that all resulting trusts rest upon *rebuttable presumption*, and that therefore other circumstances may frequently be proved to show that no trust should exist. When, for example, the conveyance is made to some one other than the real purchaser in order to hinder creditors, or to defeat their rights, or for any other illegal or unfair purpose, equity will decline to enforce for the wrong-doer the trust which would otherwise exist.⁴ And when the parties expressly stipulate that the payment is a gift to the nominal purchaser,⁵ or a loan to him;⁶ or a different trust is expressly declared in writing,⁷ or it is agreed

¹ *Currant v. Jago*, 1 Coll. C. C. 261, 263; *Lamplugh v. Lamplugh*, 1 P. Wms. 111; *Jackson v. Feller*, 2 Wend. (N. Y.) 465; *Robert's Appeal*, 85 Pa. St. 84.

² *Beckford v. Beckford*, Loft. 490; *Soar v. Foster*, 4 Kay & J. 152; *Kimmel v. McRight*, 2 Barr (Pa.), 38. But not to the illegitimate child of a legitimate child. *Tucker v. Burrow*, 2 Hem. & M. 515, 525.

³ *Grey v. Grey*, 2 Swanst. 594, 599; *Williams v. Williams*, 32 Beav. 370; *Kingdon v. Bridges*, 2 Vern. 67. See also, as to other relationships, where one nevertheless has stood *in loco parentis* to the other, *Ebrand v. Dancer*, 1 Cas. in Chan. 26; *Richardson v. SeEVERS*, 84 Va. 259; *Baker v. Leathers*,

3 Ind. 558; *Batstone v. Salter*, L. R. 10 Ch. App. 431.

⁴ *Proseus v. McIntyre*, 5 Barb. (N. Y.) 424, 425; *Ford v. Lewis*, 10 B. Mon. (Ky.) 127; *Sell v. West*, 125 Mo. 621; *Hubbard v. Goodwin*, 3 Leigh (Va.), 492; *Zundell v. Gess*, 73 Tex. 144; *Cutler v. Tuttle*, 19 N. J. Eq. 549, 562.

⁵ *Groves v. Groves*, 3 Y. & J. 163, 172; *Hunt v. Moore*, 6 Cush. (Mass.) 1; *Robles v. Clark*, 25 Cal. 317; *Zimmerman v. Barber*, 176 Pa. St. 1; *Ward v. Ward*, 59 Conn. 188; *Morris v. Clare*, 132 Mo. 232, 236.

⁶ See § 354, *supra*.

⁷ *Anstice v. Brown*, 6 Paige (N. Y.), 448; *Clark v. Burnham*, 2 Story (U. S.

that he shall receive from the property something inconsistent with a trust,¹ the court will of course refuse to raise any trust by implication.²

Similarly, the presumption of an advancement or a gift to wife or child may be readily overcome by clear evidence to show the court that a trust should exist.³ Thus, a conveyance to a wife for the purpose of defrauding creditors of the husband, who pays the consideration, will raise a trust in favor of those creditors.⁴ Payment for property taken by a child will not be an advancement, if it be understood that he shall hold it for the parent who makes the payment.⁵ And where a husband paid for land, which he caused to be conveyed to his wife upon her agreeing orally that at her death she would devise it to the Smithsonian Institution in Washington, it was held after her death intestate, and upon clear proof of the facts, that her heirs had the legal estate in the land in trust for that institution.⁶

§ 360. **Statutory Abolition of this Resulting Trust.** — In a few of the United States, where express trusts are much curtailed by statute, the perfecting of the general legislative scheme has required the abolition of the form of resulting trust now under consideration. For where, as for example in New York, a passive express trust in real property is no longer permitted, the policy of the statute could otherwise be evaded by having no trust whatever declared by the parties, but letting equity raise a resulting trust (which is passive in its nature) upon the purchase price being paid by the intended *cestui que trust* and the conveyance being taken in the name of the intended trustee. Hence this form of trust, *as a secret resulting trust*, has been

Cir. Ct.), 1; *Alexander v. Warrance*, 17 Mo. 228, 230.

¹ *Dow v. Jewell*, 21 N. H. 470.

² See also *Willis v. Willis*, 2 Atk. 71; *Farrell v. Lloyd*, 69 Pa. St. 239, 247; *Salisbury v. Clarke*, 61 Vt. 453; *Bush v. Stanley*, 122 Ill. 406; *Kline v. Ragland*, 47 Ark. 111; 1 *Perry on Trusts*, § 140.

³ *Dyer v. Dyer*, 2 Cox, 92; *In re Whitehouse*, L. R. 37 Ch. Div. 683, 685; *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91; *Jaquith v. Mass. Bap. Convention*, 172 Mass. 439; *Shepherd v. White*, 10 Tex. 72; *Bruce v. Slemp*, 82

Va. 352; 1 *Perry on Trusts*, §§ 145-147; *Bispham's Prin. Eq.* § 84.

⁴ *Belford v. Crane*, 16 N. J. Eq. 265; *Adams v. Collier*, 122 U. S. 382, 391; *McCartney v. Bostwick*, 32 N. Y. 53; *Pierce v. Hower*, 142 Ind. 626; *Cleghorn v. Obernalte*, 53 Neb. 687; *Smith v. Willard*, 174 Ill. 538; 1 *Perry on Trusts*, § 149.

⁵ *Devoy v. Devoy*, 3 Sm. & Gif. 403; *Stone v. Stone*, 3 Jur. (n. s.) 708.

⁶ *Smithsonian Institution v. Meech*, 169 U. S. 398; *Jaquith v. Mass. Bap. Convention*, 172 Mass. 439; *Hollenback v. Rogers*, 57 N. J. Eq. 199.

done away with by the statutes of New York,¹ (a) Massachusetts,² Michigan,³ Wisconsin,⁴ Illinois,⁵ Kansas,⁶ In-

(a) This New York statute was originally 1 R. S. 728, §§ 51-53. With the sentences somewhat transposed and altered, but without change of meaning, it is now Real Property Law (L. 1896, ch. 547), § 74, and reads as follows: "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee, either, 1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or, 2. In violation of some trust, purchases the property so conveyed with money or property belonging to another."

This statute saves the rights of creditors of the actual purchaser, and compels him to be just before he is generous. It appears at first sight to do away with all possibility of a resulting trust for his benefit, except where the purchase is made with his funds, in violation of some trust, or without his consent or knowledge. But, whenever A takes title to land for which B pays the consideration, and subsequently, in violation of the express or tacit understanding between the parties at the time of the purchase, A attempts to hold the property for his own benefit, or otherwise to ignore B's moral rights, the courts, because of the attempted fraud, at once raise, against A, a trust which is in reality constructive (growing as it does out of fraud) and therefore not within the letter or spirit of the statute. "It seems to be a well-settled rule of law in this state," says Van Brunt, P. J., "that, unless it appears that the person paying the consideration has consented to an unconditional and absolute conveyance of the property to another, without any recognition or intimation in respect to his rights, the statute in question will not protect the attempted fraud; and it is further held that no presumption can be indulged to support such a defence." *Church of St. Stanislaus v. Allgemeine Verein*, 31 App. Div. 133, affirmed without opinion in 164 N. Y. 606. In that case, the plaintiff, a church society which was not incorporated, took title to land in the name of the defendant; and after the church's incorporation demanded a conveyance to itself. The defendant having refused to convey, the action was brought, with the result that the conveyance was decreed. And, besides the above-quoted statement, Presiding Justice Van Brunt facetiously remarked that the statute was not intended to enable one church organization to defraud another. In the earlier case of *Jeremiah v. Pitcher*, 26 App. Div. 402, affirmed without opinion in 163 N. Y. 574, a real estate dealer, desir-

¹ N. Y. L. 1896, ch. 547, § 74.

² *Foster v. Durant*, 2 Gray (Mass.), 538; *Glidewell v. Spangh*, 26 Ind. 319.

³ *McCreary v. McCreary*, 90 Mich. 478; *Barnes v. Munro*, 95 Mich. 612;

Connolly v. Keating, 102 Mich. 1; *Tiffany v. Tiffany*, 110 Mich. 219.

⁴ *Bosworth v. Hopkins*, 85 Wis. 50; *Strong v. Gordon*, 96 Wis. 476.

⁵ *Pope v. Dapray*, 176 Ill. 478.

⁶ *Gee v. Thrailkill*, 45 Kan. 173.

diana,¹ Minnesota,² Kentucky,³ California,⁴ and perhaps some other states.⁵ But exceptions are expressly made by these statutes in favor of those who are creditors of the real purchaser at the time of the purchase; and also in favor of such purchaser himself, when without his knowledge or consent his funds are used in buying property in the name of the nominal purchaser.⁶ The courts, moreover, generally restrict the operation of such statutes to what would otherwise be secret trusts,—to cases in which one person knowingly and

ing to trade in land free from the dower right of his wife, who was insane, purchased it in the name of his daughter, who orally agreed to convey it to him, or according to his directions, upon his demand. The plan was successful in preventing any dower right from attaching to the property. *Phelps v. Phelps*, 143 N. Y. 197. But, in the action brought to establish a trust in his favor, it was held that the property was his and the daughter could not hold it to the exclusion of him, the real purchaser. To the same effect are *Smith v. Balcom*, 24 App. Div. 437, 441; *Schultze v. Mayor*, 103 N. Y. 307, 311; *Wood v. Rabe*, 96 N. Y. 414; *Fairchild v. Fairchild*, 64 N. Y. 471; *Robbins v. Robbins*, 89 N. Y. 251; *Bitter v. Jones*, 28 Hun, 492; *Gage v. Gage*, 83 Hun, 362; *Bullenkamp v. Bullenkamp*, 54 N. Y. Supp. 482. Thus, while the primary and original purpose of this section of the New York Statutes of Uses and Trusts was to prevent the indirect creation and existence of what would be in effect passive express trusts, the courts have thrown the safeguard of a wise construction around it, and so prevent it from becoming an instrument of fraud or injustice. They also raise a trust, notwithstanding the statute, where it appears, from the instrument of conveyance, or from some other instrument, or from clear and explicit evidence, that such was the intention of the parties,—cases in which the transaction is relieved from the effects of a secret trust. *Woerz v. Rademacher*, 120 N. Y. 62. See the text further, as to such statutes. Also *Schierloh v. Schierloh*, 148 N. Y. 103; *Bork v. Martin*, 132 N. Y. 280; *Niver v. Crane*, 98 N. Y. 40; *Reitz v. Reitz*, 80 N. Y. 538; *Brown v. Cherry*, 57 N. Y. 645; *Marvin v. Marvin*, 53 N. Y. 607; *Everett v. Everett*, 48 N. Y. 218; *Foote v. Bryant*, 47 N. Y. 544, 548; *McCartney v. Bostwick*, 32 N. Y. 53; *Siemon v. Schurck*, 29 N. Y. 598; *Lounsbury v. Purdy*, 18 N. Y. 515; *Gilbert v. Gilbert*, 2 Abb. Ct. App. Dec. 256; *McCahill v. McCahill*, 71 Hun, 221; *Hubbard v. Gilbert*, 25 Hun, 596; *Sayre v. Townsend*, 15 Wend. 647, 649; *Russell v. Allen*, 10 Paige, 249; *Brewster v. Power*, 10 Paige, 562; *Bodine v. Edwards*, 10 Paige, 504; *Tracy v. Tracy*, 3 Bradf. 57. The rights of creditors of the real purchaser, in such cases, are discussed in connection with constructive trusts, § 400, *infra*.

¹ *Toney v. Wondling*, 138 Ind. 228; *Glidewell v. Spaugh*, 26 Ind. 319.

² *Durfee v. Pavitt*, 14 Minn. 424; *Haaven v. Hoass*, 60 Minn. 313.

³ *Martin v. Martin*, 5 Bush (Ky.), 47; *Watt v. Watt*, 39 S. W. Rep. (Ky.) 48.

⁴ *Smith v. Mason*, 122 Cal. 426.

⁵ See *Graham v. Selbie*, 8 S. D. 604; *Brock v. Brock*, 90 Ala. 86; *Ward v. Ward*, 59 Conn. 188; *Harris v. Dougherty*, 74 Tex. 1.

⁶ See last preceding eleven notes.

intentionally purchases property in the name of another, who is guilty of no fraud, and who takes and holds the legal estate in the manner intended by the parties.¹ The letter of the statute is not permitted to be used as an instrument of fraud.² Thus, where such statutes exist, if A intentionally buy land in the name of B, there is no dower or curtesy right in such land for the wife or husband of A,³ and subsequent creditors or purchasers of A can not reach it, because A has no estate in it, either legal or equitable;⁴ but the creditors of A, who are such at the time of A's purchase, may reach it in equity as held by B in trust for the payment of their claims.⁵ But if the purchase in B's name be intended for the benefit of a partnership of which he is a member,⁶ or if when he takes the title B agree even orally to convey it to A, the real purchaser, upon A's demand, the statute can not be invoked to enable B to appropriate the property to his own use and thus to defeat the rights of A, or those of the partnership, as the case may be.⁷ In such cases, notwithstanding the letter of the statute, the courts raise what is technically a *constructive* trust (since it is implied regardless of B's intention), and thus prevent the perpetration of a fraud.⁸ Of course, in states which have such statutes, all purchases by parents or husbands in the names of wives or children come within the general rule of the statutes, and do not have to be treated as exceptions — the nominal purchasers are the actual owners.

¹ McArthur v. Gordon, 126 N. Y. 597; Smith v. Balcom, 24 N. Y. App. Div. 437, 441; Gage v. Gage, 83 Hun (N. Y.), 362; Bullenkamp v. Bullenkamp, 54 N. Y. Supp. 482; Pope v. Dapray, 176 Ill. 478, 484.

² Church of St. Stanislaus v. Allgemeine Verein, 31 N. Y. App. Div. 133, aff'd 164 N. Y. 606; Schultze v. Mayor, 103 N. Y. 307, 311; Woerz v. Rademacher, 120 N. Y. 62; Wood v. Rabe, 96 N. Y. 414; Bitter v. Jones, 28 Hun (N. Y.), 492; Smith v. Balcom, 24 N. Y. App. Div. 437, 441; Jeremiah v. Pitcher, 26 N. Y. App. Div. 402, aff'd 163 N. Y. 574; Pope v. Dapray, 176 Ill. 478, 484; Smith v. Mason, 122 Cal. 426.

³ Phelps v. Phelps, 143 N. Y. 197.

⁴ Ibid.; Moore v. Williams, 55 N. Y.

Super. Ct. 116; Linsley v. Sinclair, 24 Mich. 380.

⁵ See the wording of the statutes themselves.

⁶ Fairchild v. Fairchild, 64 N. Y. 471. See Moore v. Williams, 55 N. Y. Super. Ct. 116; Greenwood v. Marvin, 111 N. Y. 423; Traphagen v. Burt, 67 N. Y. 30; Chester v. Dickerson, 54 N. Y. 1; Levy v. Brush, 45 N. Y. 589.

⁷ Church of St. Stanislaus v. Allgemeine Verein, 31 N. Y. App. Div. 133, aff'd 164 N. Y. 606; Smith v. Balcom, 24 N. Y. App. Div. 437; Jeremiah v. Pitcher, 26 N. Y. App. Div. 402, aff'd 163 N. Y. 574; Wood v. Rabe, 96 N. Y. 414, 425; Schultze v. Mayor, 103 N. Y. 307, 311.

⁸ See discussion of constructive trusts arising from fraud or attempted fraud, § 395, *infra*.

β. *Following Trust Funds.*

§ 361. **Trusts resulting from Purchase of Property with Trust Funds.** — The equitable principle, on which depends the kind of resulting trust already discussed, is that he whose funds pay the price should be the owner of the property purchased. The second form of resulting trust rests upon the same principle; and is, in the last analysis, a subdivision of the first. It is the class of cases in which a trustee, or other person who holds funds in a fiduciary capacity, purchases property with them and takes the title in his own name. The essence of such a transaction is that the *cestui que trust*, the real owner of the funds employed, pays the consideration for the property, and the title is taken in the name of the other, the fiduciary party.¹ The nominal purchaser is accordingly presumed to have *intended* to purchase the property for the benefit of the trust estate; and a trust results in favor of the real purchaser, the owner of the purchase price.² Trust funds may thus be followed into any property into which they have been converted or invested by fiduciary holders.³ It is because of the importance of the doctrine of "following trust funds" that this second group of resulting trusts, though really a subdivision of the first, is separately discussed. And that doctrine, tersely stated, is that a *cestui que trust*, or other person whose funds have been in the hands of a fiduciary holder, can follow them and appropriate to himself the property into which they have been changed, together with the increased value of such property, provided such trust funds can be clearly ascertained, traced, and identified, and the rights of an innocent purchaser for value without notice have not intervened.⁴ The requisites here, which demand

¹ *Gale v. Harby*, 20 Fla. 171; 1 Perry on Trusts, § 127.

² "The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds." *Peckham, J.*, in *Holmes v. Gilman*, 138 N. Y. 369. And see *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552; *Converse v. Sickles*, 146 N. Y. 200; *Union Stock Yards Bk. v. Gillespie*, 137 U. S. 411; *Comm. Bk. of Pa. v. Armstrong*, 148

U. S. 50; *Farmers' and Mechanics' Bk. v. King*, 57 Pa. St. 202; *Standish v. Babcock*, 52 N. J. Eq. 628; *Preston v. Preston*, 202 Pa. St. 515; *Barnes v. Thuet*, 116 Iowa, 359; *In re Hallett's Estate*, L. R. 13 Ch. Div. 696.

³ *Holmes v. Gilman*, 138 N. Y. 369, *Nat. Bk. v. Ins. Co.*, 104 U. S. 54; 1 Perry on Trusts, § 127.

⁴ Cases cited in last two preceding notes; *Turner v. Sawyer*, 150 U. S. 578; *Riddle v. Whitehouse*, 135 U. S. 621; *Warren v. Union Bank*, 157 N. Y. 259;

discussion, are that the funds shall have been expended or disposed of by one who held them in a fiduciary capacity, that they can be traced and identified, and that the property sought to be taken has not come into the hands of an innocent purchaser for value without notice of the rights of the claimant.

§ 362. **Property held in Fiduciary Capacity.** — It may be stated generally that, for the purpose of implying a trust of this kind, courts of equity will treat the relation as fiduciary wherever one person holds money or other property which *ex equo et bono* should be handed over to another, or held or used for his benefit. Illustrations of persons occupying such positions are trustees,¹ executors or administrations,² guardians,³ directors or trustees of a corporation,⁴ the committee of a lunatic,⁵ an agent entrusted with money or other property of his principal to hold or disburse,⁶ a husband who employs his wife's funds in the purchase of land,⁷ and parents, partners, or co-tenants of whom one or more expend money belonging to the others or to all together.⁸ So,

Darrow v. Calkins, 154 N. Y. 503; Roca v. Byrne, 145 N. Y. 182; Hatch v. National Bk., 147 N. Y. 185; Cole v. Cole, 54 N. Y. App. Div. 37; Little v. Chadwick, 151 Mass. 109; Kennedy v. McCloskey, 170 Pa. St. 354; Jones v. Elkins, 143 Mo. 647; Kintner v. Jones, 122 Ind. 148; Moore v. Hamerstag, 109 Cal. 122; Story's Eq. Jur. §§ 1258, 1259; Bispham's Prin. Eq. § 86.

¹ Oliver v. Piatt, 3 How. (U. S.) 333, 401; Day v. Roth, 18 N. Y. 448; McLaren v. Brewer, 51 Me. 402; Lathrop v. Gilbert, 10 N. J. Eq. 344; Standish v. Babcock, 52 N. J. Eq. 628; McArthur v. Robinson, 104 Mich. 540; Harrisburg Bk. v. Tyler, 3 Watts & S. (Pa.) 373; Pugh v. Pugh, 9 Ind. 132.

² Buck v. Urrich, 16 Pa. St. 499; Claussen v. Le Franz, 1 Clarke (Ga.), 226; Dodge v. Cole, 97 Ill. 338; Phillips v. Overfield, 100 Mo. 466; Harper v. Archer, 28 Miss. 212.

³ Schlaefer v. Corson, 52 Barb. (N. Y.) 510; Bancroft v. Consen, 13 Allen (Mass.), 50; Durling v. Hammar, 20 N. J. Eq. 220; Turner v. Petigrew, 6 Humph. (Tenn.) 438; Hughes v. White, 117 Ind. 470; Alspaugh v. Adams, 80 Ga. 345.

⁴ Church v. Sterling, 16 Conn. 388; Palmetto Lumber Co. v. Risley, 25 S. C. 309; Church v. Wood, 5 Hamm. (Ohio) 283.

⁵ Reid v. Fitch, 11 Barb. (N. Y.) 399; Hammett's Appeal, 72 Pa. St. 337.

⁶ Day v. Roth, 18 N. Y. 448; Bank v. King, 57 Pa. St. 202; Church v. Sterling, 16 Conn. 388; Wynn v. Sharer, 23 Ind. 573.

⁷ Methodist Church v. Jaques, 1 Johns. Ch. (N. Y.) 450, 3 Johns. Ch. (N. Y.) 77; Dickenson v. Codwise, 1 Sandf. Ch. (N. Y.) 214; Barron v. Barron, 24 Vt. 375; Lathrop v. Gilbert, 10 N. J. Eq. 344; Jones v. Elkins, 143 Mo. 647.

⁸ Robinson v. Robinson, 22 Iowa, 427; Paige v. Paige, 71 Iowa, 318; Eastham v. Roundtree, 56 Tex. 110; Roberts v. Haley, 65 Cal. 397, 402; Rector v. Gibbon, 111 U. S. 276, 291; Monroe Cattle Co. v. Becker, 147 U. S. 47; Kennedy v. McCloskey, 170 Pa. St. 354; Virginia Coal Co. v. Kelly, 93 Va. 332; Moore v. Hamerstag, 109 Cal. 122; Brundy v. Mayfield, 15 Mont. 201; Union Nat. Bk. v. Goetz, 138 Ill. 127; Carley v. Graves, 85 Mich. 483; Story's

a clerk in a bank, and probably one in any ordinary clerical position, who purchases land with his employer's funds, holds it in trust for the employer.¹ And one who knowingly takes property from a person, who has purchased it with stolen funds, holds it in trust for the rightful owner.² But where one, who has property of another, does not hold it in any fiduciary capacity, as, for example, when he is holding adversely and treating it as his own with apparent cause, his purchase of realty or other property with it raises no trust.³

§ 363. **Property traced and identified.**—The principle involved in this class of trusts applies, not only to purchases with fiduciary funds, but also to assignments, deposits in bank, etc.,—to all cases generally in which the fiduciary holder has disposed of property which can still be identified in the possession of one who is not an innocent holder for value and without notice.⁴ The requirement that it shall be traced and identified is complied with if it can be found included in some particular property, fund, or account, no matter through how many changes it may have passed in reaching that position.⁵ When, therefore, a trustee mixes trust money with his own property, as by purchasing land with it and money of his own, and the specific land so purchased is known, he holds the proportion of it, which

Eq. Jur. §§ 1258-1359; 1 Perry on Trusts, § 127.

¹ Bank of Amer. v. Pollock, 4 Edw. Ch. (N. Y.) 215; Newton v. Porter, 5 Lansing (N. Y.), 416; Bassett v. Spofford, 45 N. Y. 387; 1 Perry on Trusts, § 128.

² Matter of Carin v. Gleason, 105 N. Y. 262, 303; Price v. Brown, 98 N. Y. 388, 395; Newton v. Porter, 69 N. Y. 133; Hoffman v. Carrow, 22 Wend. (N. Y.) 285.

³ Ensley v. Ballentine, 4 Humph. (Tenn.) 233. And see Parsons v. Phelan, 134 Mass. 109; Dana v. Dana, 154 Mass. 491; Turner v. Sawyer, 150 U. S. 478; Peterson v. Boswell, 137 Ind. 211; Silvers v. Potter, 48 N. J. Eq. 539; Heiskell v. Trout, 31 W. Va. 810.

⁴ Amer. Sugar Refining Co. v. Fancher, 145 N. Y. 552; Roca v. Byrne, 145 N. Y. 182; Converse v. Sickles, 146 N. Y. 200; Warren v. Union Bank, 157 N. Y. 259; Hatch v. National Bk., 147 N. Y. 184; Matter of Hicks,

170 N. Y. 195; Comm. Bk. of Pa. v. Armstrong, 148 U. S. 50; Little v. Chadwick, 151 Mass. 109; Farmers' and Mechanics' Bk. v. King, 57 Pa. St. 202; Ennor v. Hodson, 134 Ill. 32; Carley v. Graves, 85 Mich. 483; Crumrine v. Crumrine, 50 W. Va. 226. Some of these cases, and those cited in the other notes on this section, were the outcome of positive fraud, or fraudulent misappropriation of trust funds, and the trusts raised were therefore *constructive*; but they are cited to complete a general view of the doctrine of "following trust funds."

⁵ Accordingly, when property to which such a trust attaches is sold by a sheriff on execution against the holder, and the money deposited in bank in the sheriff's account, the *cestui que trust* can follow it and claim the proceeds out of that account. *In re Hallett's Estate*, L. R. 13 Ch. Div. 696; *Roca v. Byrne*, 145 N. Y. 182, 200; *Amer. Sugar Refining Co. v. Fancher*, 145 N. Y. 552.

the trust fund so used bears to the entire purchase price, for his *cestui que trust*; ¹ and, if the trustee can not clearly prove how much of his own money was used in the purchase, the *cestui que trust* may take it all. The doctrine of confusion of goods in effect applies, in such a case as the latter, to the detriment of the trustee.² This is the rule generally recognized and followed in both England and America; although it has been held in a few such instances that the *cestui que trust* had only a lien upon the land for the amount of his property which was used in its purchase.³ Of course, when all of a piece of property can be identified as bought with trust funds, it all belongs to the *cestui que trust*, even though its value may greatly exceed the value of those funds. "The court proceeds on the principle that the title has not been affected by the change of the trust funds, and the *cestui que trust* has his option to claim the property and its increased value as representing his original fund."⁴ But when the fiduciary holder has so inextricably mixed the trust property with his own or other persons' funds that it can not be identified in any form, or can only be said to make some unknown part of his *general* estate, or he has so disposed of it that it can not be found as such in any form, all possibility of

¹ *In re Hallett's Estate*, L. R. 13 Ch. Div. 696; *Jones v. Elkins*, 143 Mo. 647; *Turner v. Sawyer*, 150 U. S. 578; *Rector v. Gibbon*, 111 U. S. 276; *Ennor v. Hodson*, 134 Ill. 32; *Carley v. Graves*, 85 Mich. 483; 1 *Perry on Trusts*, §§ 127, 128.

² *Frith v. Cartland*, 34 L. J. Ch. 301; *Ex parte Dale*, L. R. 11 Ch. Div. 772; *In re Hallett's Estate*, L. R. 13 Ch. Div. 696; *People v. City Bk. of Rochester*, 96 N. Y. 32; *Comm. v. McAllister*, 28 Pa. St. 480; *McLarren v. Brewer*, 51 Me. 402; *Sherwood v. Cent. Mich. Sav. Bk.*, 103 Mich. 109; *Hill on Trustees*, 148, note.

³ See *In re Hallett & Co., Ex parte Blane* (1894), 2 Q. B. 237; *Schierloh v. Schierloh*, 148 N. Y. 103; and discussion in *In re Hallett's Estate*, L. R. 13 Ch. Div. 696. In the case last cited, in which a trustee converted the property into cash and deposited it in bank together with some of his own money, Sir George Jessel, M. R., said, in presenting a strong argument for the raising of a trust from such circumstances:

"Supposing the trust money were one thousand sovereigns, and the trustee put them into a bag, and, by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag, could anybody suppose that a judge in equity would find any difficulty in saying that the *cestui que trust* has a right to take one thousand sovereigns out of the bag." And it is to be added that, not only could he take the one thousand sovereigns (which even a lien would enable him to do), but if the entire contents of the bag had increased in value, he could take his proportion of the larger mass, which is the advantage due to his trust position. Thus, if the value had doubled, he could take out two thousand sovereigns and the trustee two; while, if he were relegated to the position of a mere lienor, he could take only his original one thousand sovereigns (with possibly interest added), and the other party would own the residue.

⁴ *Holmes v. Gilman*, 138 N. Y. 369.

raising a trust because of it is at an end;¹ and the *cestui que trust* has simply a personal remedy against the trustee.

§ 364. **Rights of Innocent Purchasers for Value.** — Finally, if in the process of changing form or possession the fund come into the hands of one who pays value for it without notice of the rights of him who claims it as *cestui que trust*, no resulting trust can arise against it in such hands. Thus, if after buying land with trust funds the trustee sell it to such a purchaser, the right of the *cestui que trust* against that land terminates.² He can follow the proceeds in the possession of the trustee, if he can find them. But, otherwise, his only remedy is a personal one against the trustee. This inability to follow any longer the land is simply one of the instances of the general rule as to innocent purchasers without notice, which has been heretofore explained³ and is further discussed hereafter, in treating of constructive trusts.⁴

γ. *Trusts Resulting from Failure of Declaration or Object.*

§ 365. **Essentials and Evidence of Such a Trust.** — “There is no equitable principle more firmly established,” says Mr. Hill, “than that where a voluntary disposition by deed or will is made to a person as trustee, and the trust is not declared at all, or is ineffectually declared, or does not extend to the whole interest given to the trustee, or it fails either wholly or in part by lapse or otherwise; the interest so undisposed of will be held by the trustee, not for his own benefit, but as a resulting trust for the donor himself, or for his heir-at-law or next of kin, according to the nature of his estate.”⁵ To bring a resulting trust of real property, then, within this third class, a conveyance *without consideration* is made to one, who is clearly intended to *hold in trust* and not for his own benefit, and either

¹ Freiberg v. Stoddard, 161 Pa. St. 259, 261; Little v. Chadwick, 151 Mass. 109; Dana v. Dana, 154 Mass. 491; Cole v. Cole, 54 N. Y. App. Div. 37; Slater v. Oriental Mills, 18 R. I. 352; Nonotuck Silk Co. v. Flanders, 87 Wis. 237; Cecil Nat. Bk. v. Thurber, 8 U. S. App. 496; Farwell v. Kloman, 45 Neb. 424; Blake v. State Sav. Bk., 12 Wash. 619; Ferchen v. Aradt, 26 Oreg. 121; Silvers v. Potter, 48 N. J. Eq. 539; Heiskell v. Trout, 31 W. Va. 810. Thus, if the trustee put the property in

his own bank, with his own funds, and then draw down the account below the amount of the trust fund, and then add to the account trust moneys of third parties, the means of identification fails and the trust ceases. Cole v. Cole, 54 N. Y. App. Div. 37.

² Cornell v. Maltby, 165 N. Y. 557; Anderson v. Blood, 152 N. Y. 285; §§ 406–409, *infra*.

³ §§ 297, 299, *supra*.

⁴ §§ 406–409, *infra*.

⁵ Hill on Trustees, 113, 114.

the purposes of the transfer are left wholly or partly undeclared, or the purpose expressed wholly or partly fails and can not be carried out.¹

When one pays value for property conveyed to him, it is conclusively presumed, in the absence of clear expressions to the contrary, that he takes it for his own benefit.² Therefore, trusts of this group must come within the sphere of voluntary conveyances. And wills, of course, supply more numerous illustrations of these than do deeds. The transfer being found to be a *gift*, by either will or deed, if it further appear that some or all of the property was not intended for the nominal donee, or can not be used as the settler designed, a trust results, as to all or some of it, as the case may be.

It is a question of evidence, to be decided upon consideration of all the circumstances of each case, whether or not the donee was intended to take the property beneficially.³ And many refined distinctions have been made in efforts to ascertain his intention.⁴ Thus, when the gift is to the wife, child, heir, or other close relative of the donor,⁵ or to an infant or other person who is incapable of executing a trust,⁶ or with expressions of affection or kindness towards the donee,⁷ these are "circumstances of evidence" which militate against the presumption of any resulting trust. But such circumstances count for little against clear and direct expressions of the settler's intent.⁸ Accordingly, where a testator gives real property to his executors as trustees, "*upon a trust to pay debts*," and at the time of his death he has no debts, the executors take it as a resulting trust for his heirs;⁹ while if only some of it be needed for the payment of his debts, the residue

¹ O'Connor v. Gifford, 117 N. Y. 275; Mosher v. Funk, 194 Ill. 351; 1 Perry on Trusts, §§ 150-160.

² Ridout v. Dowding, 1 Atk. 419; Brown v. Jones, 1 Atk. 188; Kerlin v. Campbell, 15 Pa. St. 500; Anderson v. Blood, 152 N. Y. 285.

³ Walton v. Walton, 14 Ves. 318, 322; Hill v. Bishop of London, 1 Atk. 619; Starkey v. Brooks, 1 P. Wms. 390; Hugbous v. Yates, 9 Mod. 122.

⁴ Perry on Trusts, §§ 151-153.

⁵ Jennings v. Selleck, 1 Vern. 467; Hayes v. Kingdom, 1 Vern. 33; Christ's Hospital v. Budgin, 2 Vern. 683; Rogers

v. Rogers, 3 P. Wms. 193; Randall v. Bookey, 2 Vern. 425.

⁶ Blinkhorn v. Feast, 2 Ves. Sr. 27; Williams v. Jones, 10 Ves. 77.

⁷ Cook v. Hutchinson, 1 Keen, 42; Rogers v. Rogers, 3 P. Wms. 193; Meredith v. Heneage, 1 Sim. 542, 555; Wood v. Cox, 2 Myl. & Cr. 684, 692.

⁸ King v. Dennison, 1 Ves. & Bea. 260, 275; King v. Mitchell, 8 Pet. (U. S.) 326, 349.

⁹ King v. Dennison, 1 Ves. & Bea. 260, 272; Morice v. Bishop of Durham, 9 Ves 399, 10 Ves. 522; Gloucester v. Wood, 1 H. L. Cas. 272; Schmucker's Est. v. Reed, 61 Mo. 592.

results to his heirs.¹ So, when a devise is made to A, "upon the trusts hereafter to be declared," and no trust is ever declared, or those declared do not exhaust the property, a resulting trust arises in favor of the deviser's heirs.² And when a gift is made for a purpose that is illegal, or otherwise void or ineffectual, as if it violate some statute or positive rule of law,³ or when the designated *cestui que trust* dies before the testator and the attempted gift lapses, a resulting trust comes into being.⁴

§ 366. **Effects of Residuary Clauses in Wills.** — If a will contain a general residuary clause, a *legacy* given by the will on a trust that fails does not form a resulting trust, but passes to the residuary legatee;⁵ except in the case where the trust legacy itself forms a part of the residuary estate.⁶ But, at common law, when *real property* was devised upon a void trust, or one that failed, it did not pass under any residuary clause in the will, but a trust in it resulted to the heirs of the testator.⁷

¹ King v. Dennison, 1 Ves. & Bea. 260; McElroy v. McElroy, 113 Mass. 509. See Irvine v. Sullivan, L. R. 8 Eq. 673; Downer v. Church, 44 N. Y. 647; Schmucker's Est. v. Reed, 61 Mo. 592; Heidenheimer v. Bauman, 84 Tex. 174.

² London v. Garway, 2 Vern. 571; Sidney v. Shelley, 10 Ves. 363; Atty-Gen. v. Windsor, 8 H. L. Cas. 369; Pratt v. Sladden, 14 Ves. 193, 198; Mence v. Mence, 18 Ves. 348; Sturtevant v. Jaques, 14 Allen (Mass.), 523, 526; Shaw v. Spencer, 100 Mass. 382, 388; Schmucker's Est. v. Reed, 61 Mo. 592.

³ Russell v. Jackson, 10 Hare, 204; Carrick v. Errington, 2 P. Wms. 361; Johnson v. Clarkson, 3 Rich. Eq. (S. C.) 305; Edson v. Bartow, 154 N. Y. 199, 768; St. Paul's Church v. Atty-Gen., 164 Mass. 188; Rudy's Estate, 185 Pa. St. 359; Farrington v. Putnam, 90 Me. 405; Heiskell v. Trout, 31 W. Va. 810; Lusk v. Lewis, 32 Miss. 297.

⁴ Ackroyd v. Smithson, 1 Bro. Ch. 503; O'Connor v. Gifford, 117 N. Y. 275, 281; Haskins v. Kendall, 158 Mass. 224; Harker v. Reilly, 4 Del. Ch. 72; Bond v. Moore, 90 N. C. 239. So, in case of an insufficient declaration of an intended trust, or a failure of its purpose for any other reason, as by the dissolution of the corporation for which it was

made, a trust of this kind is generally the outcome. Williams v. Kershaw, 5 Cl. & Fin. 111; Shaw v. Spencer, 100 Mass. 382, 388; Coburn v. Anderson, 131 Mass. 513; King v. Mitchell, 8 Pet. (U. S.) 326; Gumbert's Appeal, 110 Pa. St. 496; Jenkins v. Jenkins University, 17 Wash. 160; Hill on Trustees, 116; 1 Perry on Trusts, §§ 159, 160.

⁵ Dawson v. Clarke, 15 Ves. 409, 417; Marsh v. Wheeler, 2 Edw. Ch. (N. Y.) 156; Woolmer's Estate, 3 Whart. (Pa.) 477; Pool v. Harrison, 18 Ala. 515.

⁶ Skrymsher v. Northcote, 1 Swanst. 566; Leake v. Robinson, 2 Meriv. 363, 392; Smith v. Cooke (1891), App. Cas. 297; Floyd v. Barker, 1 Paige (N. Y.), 480; 1 Perry on Trusts, § 160.

⁷ The reason for this lay in the common-law rules, which required a *definite and specific description* of real property intended to be disposed of, and that the testator should be *seised* of it at the time when he made the will, and remain continuously and uninterruptedly so seised until he died. A residuary gift, disposing generally of what was left of a testator's property at the time of his death, after all other gifts made by the will had been satisfied, could not comply with these requirements. 2 Blackst.

In England, New York, (a) New Jersey, Maine, and some other states of this country, the rule in this regard has been made uniform for both kinds of property, by statutes which make lapsed legacies and lapsed devises alike pass to a general residuary donee, unless a different intent appears from the language of the will.¹

§ 367. **Gifts for Charity not apt to cause such Resulting Trusts.**—Another qualification, to be noted, to the class of resulting trusts now under consideration, is that, when the object of an attempted trust is charitable, a resulting trust does not so readily arise as when the specified object is a private trust.² This is because the *cy pres* doctrine can usually be applied to fix the destination of charitable gifts, even though the exact purposes intended may not be clearly indicated, or may wholly or partly fail.³ A private trust must be carried out as directed, or not at all. But, as already explained, when property is given for a *general charitable* purpose, but the particular object is not clearly specified, or if specified can not be realized in just that manner, or does not exhaust the entire fund, the general scheme ordinarily can and will be carried out by the court. Therefore, there is less apt to be property to result in trust in this latter class of gifts than in those that are private. But

(a) The New York statute, 2 R. S. 57 (R. S. 9th ed. p. 1876), § 5, provides that, "Every will that shall be made by a testator, in express terms of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death." And of this the Court of Appeals says: "The common-law rule that lapsed devises do not fall into the residue, but go to the heirs as undisposed of by the will, was done away with in New York by 2 R. S. 57, § 5; and there is now no difference between lapsed devises and lapsed legacies, as it respects the operation upon them of a general residuary clause." *Cruikshank v. Home for the Friendless*, 113 N. Y. 337; *Onderdonk v. Onderdonk*, 127 N. Y. 196; *Youngs v. Youngs*, 45 N. Y. 254; *Van Kleeck v. Dutch Reformed Church*, 6 Paige, 600, 20 Wend. 457.

Com. p. *513; 4 Kent's Com. 541; Year Book, 44 Edw. III. p. 33; Digby, Hist. Law R. P. (5th ed.) p. 385; *Van Kleeck v. Dutch Reformed Church*, 6 Paige (N. Y.), 600, 20 Wend. (N. Y.) 457; *Hayden v. Stoughton*, 5 Pick. (Mass.) 528.

¹ 7 Wm. IV. and 1 Vict. ch. 26, § 24; 2 N. Y. R. S. 57 (R. S. 9th ed. p. 1876), § 5; 1 Stim. Amer. Stat. L. § 2822;

Cruikshank v. Home for Friendless, 113 N. Y. 337; *Molineux v. Reynolds*, 54 N. J. Eq. 559; *Merrill v. Hayden*, 86 Me. 133; *Brigham v. Shattuck*, 10 Pick. (Mass.) 306; *Clapp v. Stoughton*, 10 Pick. (Mass.) 463.

² *Thetford School Case*, 8 Rep. 130 b; *Moggridge v. Thackwell*, 7 Ves. 36; § 347, *supra*.

³ §§ 347, 349, *supra*.

even when real property is given to trustees for a charitable object, if it be clearly for a specified particular object only, and that object can not be carried out, the trustees will take the property upon a resulting trust for the settler or his heirs.¹

§ 368. **General Gift, or Gift for Specific Purpose, as causing Such a Trust.** — A distinction is also to be noticed between a gift in trust for a particular purpose, whether public or private, and a gift to one, apparently for his own benefit, but having a duty, or *charge*, impressed upon it for some specified purpose, as, for example, to pay the settler's debts. In the former case, a trust results in the surplus, after the particular purpose is accomplished,² while, in the latter case, the surplus belongs to the donee.³ The difficulty often is to determine, from the evidence, into which of these types a given case falls. Vice-Chancellor Wood's oft-quoted rules upon this matter are as follows: "1st, where there is a gift to A, to enable him to do something, where he has a choice whether he will do it or not, then the gift is for his own benefit, the motive why it is given to him being stated; 2d, where you find the gift is for the general purposes of the will, then the person who takes the estate cannot take the surplus, after satisfying the trust, for his own benefit; and 3d, where a charge is created by the will, the devisee takes the surplus for his own benefit, no trust being implied."⁴

δ. Trusts resulting from Conveyances not expressing any Consideration or Use.

§ 369. **Reasons for Such Trusts.** — After uses became a prominent feature of real property, the conveyance of land by its owner to some other person, to hold to the use of such owner, was so ordinary a transaction that the courts came to regard all transfers of the legal estate, by common-law conveyances, where no consideration was expressed and no use de-

¹ Hopkins v. Grimshaw, 165 U. S. 342, 353. And see §§ 347, 349, *supra*.

² King v. Dennison, 1 Ves. & Bea. 260, 272; McElroy v. McElroy, 113 Mass. 509; Smith v. Abbott (1900), 2 Ch. 326.

³ Hill v. Bishop of London, 1 Atk. 619; Dawson v. Clarke, 18 Ves. 247; Irvine v. Sullivan, L. R. 8 Eq. 673;

Downer v. Church, 44 N. Y. 647; George v. Grose (1900), 1 Ch. 84.

⁴ Barrs v. Fewkes, 2 Hem. & M. 60. And see Saltmarsh v. Barrett, 29 Beav. 474; Ellcock v. Mapp, 3 H. L. Cas. 492; Cooke v. Stationers' Co., 3 Myl. & K. 262; Hale v. Horne, 21 Gratt. (Va.) 112; Shaeffer's Appeal, 8 Pa. St. 38; 1 Perry on Trusts, § 152; Hill on Trustees, 119; Bispham's Prin. Eq. § 88.

clared, as intended for the use of the transferor, who was commonly called the *feoffor*.¹ That is, a use resulted to him who made a common-law conveyance to a stranger, without expressing any consideration or any other use.² And if he declared a use as to part of the property or estate, and not in the residue, the use in such residue resulted to him. Or, as Lord Coke expressed it, "*so much of the use as the owner of the land does not dispose of remains in him.*"³ This doctrine was not altered by the Statute of Uses. And when the use reappeared as a trust, after the decision of Tyrrel's Case, the same doctrine remained as the foundation of the class of resulting trusts, which forms the fourth and last group of such trusts for our consideration.⁴ Probably it was to prevent any possible operation of this principle that the custom arose of reciting a consideration of one dollar in quit-claim deeds, whether any consideration is paid or not; for such a recital can not be rebutted by extraneous evidence, for the purpose of raising a resulting use or trust and thus nullifying the effect of the deed.⁵

§ 370. **They arose only from Absolute Common-Law Conveyances.** — Resulting trusts of this group must arise, if at all, from common-law forms of conveyance, such as feoffments, grants, releases, etc., and not from those kinds of deeds and transfers which arose and operated under the Statute of Uses; for the latter always contain a declaration of the use for which the conveyance is made.⁶ No resulting trust would be implied, moreover, even from a common-law conveyance, when it was to the wife or a child of the grantor; for the *good* considera-

¹ Bacon on Uses, 317; Cruise, Dig. tit. xi. ch. 4, § 16 *et seq.*; Hill on Trustees, 196; 1 Perry on Trusts, § 161.

² "For where there is neither consideration, nor declaration of use, nor any circumstance to show the intention of the parties, it cannot be supposed that the estate was intended to be given away." Cruise, Dig. tit. xi. ch. 4, § 16.

³ Cruise, Dig. tit. xi. ch. 4, § 17.

⁴ Cruise, Dig. tit. xii. ch. 1, § 52; Dyer v. Dyer, 2 Cox, 92; Hayes v. Kingdome, 1 Vern. 33; Van der Volgen v. Yates, 9 N. Y. 219, 223; Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405; Pinney v. Fellows, 15 Vt. 525, 538.

⁵ Riley v. Riley, 83 Hun (N. Y.), 398; Weiss v. Heitcamp, 127 Mo. 23; Bobb v. Bobb, 89 Mo. 411; Graves

v. Graves, 29 N. H. 129; Philbrook v. Delano, 29 Me. 410, 420; Thomas v. McCormick, 9 Dana (Ky.), 108. But it has also been held that a mere nominal consideration, of which one dollar is the common illustration, i. e., a consideration not being anything substantial as compared with the value of the property, will not prevent a resulting trust, as distinguished from the old resulting use, from being raised by equity. 1 Spence, Eq. Jur. 467; Hill on Trustees, 107, note; 1 Perry on Trusts, § 161; 2 Wash. R. P. (6th ed.) § 1421.

⁶ Cruise, Dig. tit. xi. ch. 4, § 16; Coffey v. Sullivan, 63 N. J. Eq. 296; 1 Perry on Trusts, § 162. For the forms of common-law conveyances, see 2 Blackst. Com. p. *309 *et seq.*

tion arising from the relationship was enough to cause the presumption that the grantee was meant to take beneficially.¹ So, very slight evidence of intent would be sufficient in any case to rebut this weak presumption that there was a trust for the grantor. For example, it was declared that the mere existence of the duties which rested upon a grantee of a temporary interest, such as one for life or for a term of years, was enough to indicate a beneficial transfer to him, and so to overcome the presumption of a resulting trust.²

§ 371. **Such Trusts are not now favored.** — It is apparent, from the foregoing paragraphs, that the resulting trust of this fourth class never rested on anything but a very slight presumption, which could be readily rebutted by a little evidence of the grantor's different intention. It was simply a rule which placed a light burden upon a grantee, to show that a voluntary conveyance was meant to be beneficial to himself.³ In most jurisdictions, this light burden has been shifted by the modern rule; and, by the weight of authority to-day, if the instrument of conveyance be perfectly executed and intended to operate at once, no resulting trust will arise from the mere facts alone that it is voluntary and expresses no consideration and declares no use.⁴ But the addition of very slight evidence will raise a resulting trust in favor of the grantor or his heirs.⁵ And in a few states, such as Indiana,⁶ Tennessee,⁷ and Nevada,⁸ and also in England as would appear from the more recent decisions,⁹ the old rule is still retained.

§ 372. **Execution of Resulting Trusts.** — It should be here repeated that, when a remedy is sought, any of the forms of resulting trusts is commonly executed, and the *cestui que trust*

¹ *Spirett v. Willows*, 3 DeG. J. & S. 293; *Spicer v. Ayers*, 2 N. Y. Super. Ct. 626; *Donnica v. Coy*, 28 Mo. 525. This is the same principle as that which gives rise to the exception to the first class of resulting trusts above discussed.

² *Castle v. Dod*, Cro. Jac. 200; 1 Prest. Est., p. *292; 1 Spence, Eq. Jur. 452; 2 Rolle, Abr. 781, F.

³ *Bacon on Uses*, 317.

⁴ *Rogers v. New York & Texas Land Co.*, 134 N. Y. 197; *Goldsmith v. Goldsmith*, 145 N. Y. 313; *Hutchinson v. Hutchinson*, 84 Hun (N. Y.), 482; *Lovett v. Taylor*, 54 N. J. Eq. 311; *Fitzgerald v. Fitzgerald*, 168 Mass. 488; *Steven-son v. Crapnell*, 114 Ill. 19; *Tillaux v.*

Tillaux, 115 Cal. 663. And see *Larnon v. Knight*, 114 Ill. 232, 236; 1 Perry on Trusts, § 162.

⁶ *Clavering v. Clavering*, 2 Vern. 473; *Edwards v. Culbertson*, 111 N. C. 342; *Graff v. Rohrer*, 35 Md. 327; *Hill on Trustees*, 170.

⁷ *Giffen v. Taylor*, 139 Ind. 573; *Myers v. Jackson*, 135 Ind. 136.

⁸ *Nashville Trust Co. v. Lammon*, 36 S. W. Rep. (Tenn.) 977.

⁹ *Bowler v. Curler*, 21 Nev. 158.

⁹ *In re Duke of Marlborough* (1894), 2 Ch. 133; *Rochevoucauld v. Boustead* (1897), 1 Ch. 196. Compare *Haigh v. Kaye*, L. R. 7 Ch. App. 469, and *Leman v. Whitley*, 4 Russ. 423.

thus obtains his redress, by a conveyance of the legal estate to him from the trustee; or satisfaction is given to him by a judgment or decree of the court vesting the legal estate in him, or declaring it to be so vested, without any conveyance.¹ But, when the trustee has reasonably incurred any expense in caring for the property or dealing with it, he is ordinarily entitled to be reimbursed, and may hold the legal estate until justice is thus done to him.²

¹ *Millard v. Hathaway*, 27 Cal. 119.

² *Malroy v. Sloans*, 44 Vt. 311.

CHAPTER XXIII.

(b) CONSTRUCTIVE TRUSTS.

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§ 373. **Constructive Trusts — Groups.** — Constructive trusts, or those which are implied by equity without regard to the intent of the parties,¹ arrange themselves naturally into three chief groups or divisions, namely: *a.* Constructive trusts arising from *actual fraud*, i.e., from direct facts or circumstances of imposition or unfair dealing, *β.* Constructive trusts arising from *presumptive fraud*, i.e., fraud inferred or apprehended by equity from the nature of the transaction or the relations of the parties, or as affecting third parties, and *γ.* Constructive trusts arising in the absence of fraud, which are raised by equity as affording the best remedies and working out the most substantial justice for the interested parties.² An illustration of the first of these groups is where, by false statements intentionally made to deceive the owner of land, one induces him to transfer the legal estate in the property;³ the second group is illustrated by a transaction between a trustee and his *cestui que trust*, whereby the former seeks to acquire for his own benefit the property which he was holding for the latter;⁴ and a common illustration of the last group is supplied by every ordinary contract for the purchase and sale of real property, for while such a contract is running and until the deed is delivered, the party who has agreed to sell holds the land as a constructive trustee for him who has agreed to purchase.⁵ Courts of

¹ See distinction between constructive trusts and resulting trusts, § 351, *supra*.

² See Lord Mansfield's classification of fraud in *Chesterfield v. Janssen*, 1 Atk. 301, 1 Lead. Cas. Eq. 541; 1 Perry on Trusts, ch. vii.; Story's Eq. Jur. § 258. This classification has been much criticised by distinguished authorities, especially in regard to its division of fraud into actual or "legal" and constructive or presumed. *Derry v. Peek*, L. R. 14 App. Cas. 337, 346; *Angus v. Clifford* (1891), 2 Ch. 449; *Joliffe v. Baker*, L. R. 11 Q. B. Div. 255, 271; *Bokee v. Walker*, 14 Pa. St. 139, 141; *Pollock on Contracts*, 480.

But it is clear and practical and supported by the authority of such names as Story and Lord Hardwicke.

³ *Chesterfield v. Janssen*, 2 Ves. 125; *Ahrens v. Jones*, 169 N. Y. 555; *Grove v. Kane*, 195 Pa. St. 325; 1 Perry on Trusts, § 171.

⁴ *Coles v. Trecothick*, 9 Ves. 234; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Morse v. Hill*, 136 Mass. 60; *Ryle v. Ryle*, 41 N. J. Eq. 582; *Adams v. Cowen*, 177 U. S. 471.

⁵ *Green v. Smith*, 1 Atk. 572; *Williams v. Haddock*, 145 N. Y. 144, 150; *Potter v. Jacobs*, 111 Mass. 32; *Reed v. Lukens*, 44 Pa. St. 200; *Roberts v. Nor. Pac. R. Co.*, 158 U. S. 1.

equity take cognizance of the first of these groups, because the remedy thus afforded through the medium of a trust is ordinarily better than any that can be obtained from the common-law courts. The second group springs from a species of fraud which is solely of equitable cognizance, for in courts of law fraud must always be clearly proved and will never be *presumed*.¹ The constructive trusts of the third group afford scope for some of the most interesting and important equitable remedies, such as the specific performance of contracts, and several forms of relief by injunction.² Each of these divisions or groups of constructive trusts is to be separately discussed.

a. Constructive Trusts arising from Actual Fraud.

§ 374. **Trusts ex Maleficio.** — Trusts *ex maleficio* — arising from *actual fraud*, i. e., from circumstances of direct imposition or unfair dealing — come into being because by such means either a conveyance of property has been obtained, or an intended conveyance or transfer has been prevented. In either case, the wrong intended or perpetrated is best obviated or redressed by treating the person who would otherwise profit thereby as a constructive trustee for the injured party. Thus, where A by false statements induces B to deed land to him for little or no consideration, he will hold it in trust for B.³ And when an heir inherits realty from his ancestor, because he fraudulently induced the latter to abstain from willing it away to another person, he takes the legal estate in trust for such injured person, who should rightfully have been the devisee of the same.⁴

§ 375. **Transfer of Legal Estate obtained by Actual Fraud.** — Whenever by actual fraud one is induced to part with the legal title to or estate in his property, he has a remedy at law in an action for damages;⁵ and, in holding the wrong-doer to be a constructive trustee, equity assumes jurisdiction concurrently with law, but affords a different kind of redress.⁶ While it

¹ Bispham's Prin. Eq. § 198.

² Quigley v. Gridley, 132 Mass. 35, 40.

³ Tyler v. Black, 54 U. S. 230; Boyce v. Grandy, 28 U. S. 210; Ahrens v. Jones, 169 N. Y. 555; 1 Perry on Trusts, § 171.

⁴ Middleton v. Middleton, 1 Jac. &

W. 94, 96; Mestaer v. Gillespie, 11 Ves. 621, 638; Fischbeck v. Gross, 112 Ill. 208; Church v. Ruland, 64 Pa. St. 432; 1 Perry on Trusts, § 181.

⁵ Boyce v. Grandy, 28 U. S. 210, 220.

⁶ Evans v. Bicknell, 6 Ves. 174, 182; Bacon v. Bronson, 7 Johns. Ch. (N. Y.) 194, 201.

seems to be clear, however, that in the absence of statutory prohibition the latter court *may* take cognizance of all such cases of fraud and raise constructive trusts,¹ yet in practice it does so only when there is no full and adequate remedy in any other tribunal.² When damages in money, for example, will amply repay the injured party for his loss, as is ordinarily the case in a contract of sale, mortgage, or warranty of personal property, he is left to his redress at law.³ But, since each piece of real property has and must retain a situation different from every other piece, and therefore its loss by fraud may not be computable in terms of money, on application to equity by one who has been defrauded of such property, that court will uniformly raise a constructive trust in his favor. And, on demand by the beneficiary, the constructive trustee will be compelled to re-convey the land and account for its profits while he held it, or a re-conveyance will be declared by the court.⁴

This is true except in cases in which there has been fraud in obtaining a will. Courts of probate have always had complete jurisdiction of wills of personalty; and by modern statutes that jurisdiction has been generally extended over wills of realty.⁵ And the validity of a will of realty could always be determined, and complete justice ordinarily done regarding the same, in the common-law courts. Therefore, the rule has become well settled that equity will not usually interfere to raise a trust or to set aside a transfer because of the procuring of a will by fraud.⁶ But even here, when the wrong-doer has obtained by

¹ *Evans v. Bicknell*, 6 Ves. 174, 182; *Russell v. Farley*, 105 U. S. 433; *Bacon v. Bronson*, 7 Johns. Ch. (N. Y.) 194; 1 *Spence, Eq. Jur.* 625.

² *Buzard v. Houston*, 119 U. S. 347.

³ *Newham v. May*, 13 Price, 749, 751; *Buzard v. Houston*, 119 U. S. 347; *In re Sawyer*, 124 U. S. 200, 213; *Force v. City of Elizabeth*, 27 N. J. Eq. 408.

⁴ *Earl of Bath's Case*, 3 Ch. Cas. 55, 56; *Neville v. Wilkinson*, 1 Bro. Ch. 543, 596; *Tyler v. Black*, 54 U. S. 230; *Ahrens v. Jones*, 169 N. Y. 555; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Heuschel v. Mamero*, 120 Ill. 660; *Sohler v. Sohler*, 135 Cal. 323.

⁵ In the old Probate Courts of England (the so-called Ecclesiastical Courts), a will of real property could not be probated, and a will which disposed of both realty and personalty could be probated

as to the personalty only. This has been universally changed by statute, so that both species of will are required to be probated. But in a few states of this country, such as New York and New Jersey, the validity of a devise of real property may be tested over and over again in the common-law court, even after the will has been duly probated. N. Y. Code Civ. Pro. §§ 2626-2628; *Corley v. McElmeel*, 149 N. Y. 228; *Allaire v. Allaire*, 37 N. J. L. 312; 1 *Perry on Trusts*, § 182. In New York, however, its validity or invalidity may now be settled once for all by an action in the Supreme Court, at any time within two years after probate. N. Y. Code Civ. Pro. § 2653 a; *Dobie v. Armstrong*, 160 N. Y. 584.

⁶ *Allen v. McPherson*, 1 H. L. Cas. 191; *Roberts v. Wynne*, 1 Ch. Rep. 125;

his attempted fraud a particular devise or bequest in a will otherwise valid, as by orally promising to hold it for another, and subsequently attempting to ignore such promise;¹ or has fraudulently procured a will giving him an interest in real property which can not be reached by any real action, as when it is only a remainder or reversion of which he can not take present possession,² equity will prevent a fraud by treating him as a trustee for the party who should rightfully have the property.³

§ 376. **Elements of Such Fraud.** — In order to establish a trust against one who by actual fraud has obtained the legal estate from the rightful owner, all the elements of the wrongful act must be proved, in substantially the same manner as in an action in tort for fraud in a court of common law. The complainant might elect to sue in tort and recover pecuniary damages. Instead of doing so, he goes into equity for a different and for him a better remedy; and there he proves the six requisites to the existence of actual fraud. These are, that the defendant made a representation which in spirit and essence was false, and that he did so either by expressing an untruth (*expressio falsi*)⁴ or by suppressing the truth (*suppressio veri*), as by remaining silent when it was his duty to speak;⁵ that he made such representation with wrongful and fraudulent intent, which fact may be proved by showing that he knew or believed it to be false, or that he was aware that he did not know whether it was true or false, or that although he believed it to be true he had no reasonable ground for the belief and so his belief can not be said to be honest;⁶ that he made it with

Ellis v. Davis, 109 U. S. 485; *Colton v. Ross*, 2 Paige Ch. (N. Y.) 396; *Adams v. Adams*, 22 Vt. 50; *Garland v. Smith*, 127 Mo. 583; *Langdon v. Blackburn*, 109 Cal. 19. In a few early English cases, the opposite view was held. See *Maundy v. Maundy*, 1 Ch. Rep. 66; *Welby v. Thornagh*, Pr. Ch. 123; *Goss v. Tracy*, 1 P. Wms. 287. But now the rule as stated in the text is everywhere settled. See also 1 *Perry on Trusts*, § 182; *Bispham's Prin. Eq.* § 199.

¹ *Kennell v. Abbott*, 4 Ves. 802; *Matter of Will of O'Hara*, 95 N. Y. 403; *Church v. Ruland*, 64 Pa. St. 432; *Gilpatrick v. Glidden*, 81 Me. 137.

² *Brady v. McCosker*, 1 N. Y. 214; *Clarke v. Sawyer*, 2 N. Y. 498. See

Anderson v. Anderson, 112 N. Y. 104, 113-116.

³ Cases cited in last two preceding notes; 1 *Perry on Trusts*, § 182; *Bispham's Prin. Eq.* § 199.

⁴ See *Le Lievre v. Gould* (1893), 1 Q. B. 491, 498; *Kountze v. Kennedy*, 147 N. Y. 124.

⁵ *Broderick v. Broderick*, 1 P. Wms. 238; *Boyce v. Grandy*, 28 U. S. 210; *Atwood v. Small*, 6 Clark & Fin. 232; *Brownlie v. Campbell*, L. R. 5 App. Cas. 925; *Schumaker v. Mather*, 133 N. Y. 590; *People v. Peckens*, 153 N. Y. 576, 592. See 1 *Perry on Trusts*, §§ 171-177.

⁶ *Derry v. Peek*, L. R. 14 App. Cas. 337, 372; *Angus v. Clifford* (1891), 2 Ch.

intent that it should be acted on, or with reasonable ground to believe that it would be acted on;¹ that it was acted on by the complainant, who under the circumstances was justified as a reasonable person in so acting;² that the statement was material—a substantial moving cause of the complainant's conduct,³ and that it has caused pecuniary damage as a proximate result, or will do so unless the relief prayed for—the establishment of a constructive trust and the consequent disposition of the property—is granted by the court.⁴

All of these elements of actual fraud have been fully discussed and explained by the courts. Thus, it is settled that the false representation may be made by words written or spoken, by signs, gestures, or other acts, or by remaining silent or passive when one is under a duty to act or speak. Such a duty arises whenever a fiduciary relation exists between the parties;⁵ and also generally in the case of a latent defect in the thing involved, of which defect one party is aware, and which he believes the other party does not know of and

449; *Edington v. Fitzmaurice*, L. R. 29 Ch. Div. 459; *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665; *Lamberton v. Dunham*, 165 Pa. St. 129; *Hadcock v. Osmer*, 153 N. Y. 604; *Nash v. Minnesota Title Co.*, 163 Mass. 574; *Bispham's Prin. Eq.* § 214; 1 *Perry on Trusts*, § 174; *Kerr on Fraud and Mistake*, 73, 74; 1 *Story's Eq. Jur.* §§ 192, 193. When he who makes the representation fairly and honestly believes in its truth, he is not guilty of fraud. *Angus v. Clifford* (1891), 2 Ch. 449; *Nash v. Minnesota Title Co.*, 163 Mass. 574; *Kountze v. Kennedy*, 147 N. Y. 124; *Houston v. Thornton*, 122 N. C. 365.

¹ "Where a party intentionally or by design misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him—in every such case there is positive fraud in every sense of the term; there is an evil act, with an evil intent, *dolum malum, ad circumviendum.*" 1 *Story's Eq. Jur.* §§ 192, 193; *Hickey v. Morrell*, 102 N. Y. 454.

² *Atwood v. Small*, 6 Cl. & Fin. 232,

336; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1, 13; *Hickey v. Morrell*, 102 N. Y. 454; *Brown v. Leach*, 107 Mass. 364; *Clark v. Everhart*, 63 Pa. St. 347; *Pratt v. Philbrook*, 33 Me. 17; *Parker v. Hayes*, 39 N. J. Eq. 469; *Bispham's Prin. Eq.* § 215.

³ *Pulsford v. Richards*, 17 Beav. 87, 96; *Arnison v. Smith*, L. R. 41 Ch. Div. 348; *Strong v. Strong*, 102 N. Y. 69; *Levick v. Brotherline*, 74 Pa. St. 149, 157; *Kerr on Fraud and Mistake*, 73, 74; 1 *Perry on Trusts*, § 175.

⁴ *Smith v. Kay*, 7 H. L. Cas. 750, 775; *Clarke v. White*, 37 U. S. 178; *Wells v. Waterhouse*, 22 Me. 131; *Taylor v. Guest*, 58 N. Y. 262; *Hotchkin v. Third Nat. Bk. of Malone*, 127 N. Y. 329; *Branham v. Record*, 42 Ind. 181; *Rogers v. Higgins*, 57 Ill. 244; *Marr's Appeal*, 78 Pa. St. 66, 69; *Kerr on Fraud and Mistake*, 94.

⁵ *Bulkley v. Wilford*, 2 Cl. & Fin. 102; *Brownlie v. Campbell*, L. R. 5 App. Cas. 925; *Pidcock v. Bishop*, 3 Barn. & Cr. 605; *Bennett v. Judson*, 21 N. Y. 238; *Paddock v. Strobbridge*, 29 Vt. 470; *Kerr on Fraud and Mistake*, 95; 1 *Perry on Trusts*, § 178.

can not with due diligence discover.¹ The representation made in either of these ways must be of some material *fact*, and not merely as matter of opinion or judgment.² The vendor may praise the property to be sold, or *puff* its value, or depreciate the worth of what is offered in exchange, without being guilty of fraud. But if he misrepresent a fact, as by stating that the house is newer than he knows it to be, or by failing to reveal the truth known to himself as to the recent removal therefrom of a smallpox patient, he is guilty of the act which constitutes the first of the above-stated requisites of actual fraud.³ So, the other party must have fairly or justifiedly relied upon the representation as a fact.⁴ If he knew or honestly believed it to be false,⁵ or made inquiries for himself and ascertained that it was not true,⁶ or if it were so plainly absurd, indefinite, or impossible that no reasonable man could be expected to rely upon it,⁷ one of the requisites to this kind of fraud would be lacking. In a word, it is not a case to call for equitable relief on the ground of actual fraud, unless there are alleged and proved all the elements of that wrong, in the manner more fully explained in the books on fraud, as the basis of an action in tort.⁸

§ 377. **Transfer of Legal Estate prevented by Fraud.** — In cases, moreover, where conveyances or other transfers of legal interests have been prevented by fraud, constructive trusts will be declared in favor of those who ought rightfully to have the property.⁹ Thus, if an heir inherit land because by false re-

¹ *Hill v. Gray*, 1 Stark. 434; *Keates v. Cadogan*, 2 Eng. L. & Eq. 318; *Squire v. Whitton*, 1 H. L. Cas. 333; *Leake on Contracts*, 199. See *Laidlaw v. Organ*, 15 U. S. 178.

² *Southern Construction Co. v. Silva*, 125 U. S. 247; *Sawyer v. Prickett*, 86 U. S. 146; *Hadcock v. Osmer*, 153 N. Y. 604; *Watts v. Cummins*, 59 Pa. St. 84; *Bispham's Prin. Eq.* § 207.

³ *Ferson v. Sanger*, 1 Wood & M. 138, 146; *Lowndes v. Lane*, 2 Cox, 363; *Tyler v. Black*, 54 U. S. 230; *Rush v. Vought*, 55 Pa. St. 437; *Cesar v. Karutz*, 60 N. Y. 229; *Daly v. Wise*, 132 N. Y. 306; 1 *Perry on Trusts*, § 173.

⁴ *Atwood v. Small*, 6 Cl. & Fin. 232, 336; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1, 13; *Hickey v. Morrell*, 102 N. Y. 454; *Parker v. Hayes*, 39 N. J. Eq. 469.

⁵ *Hough v. Richardson*, 3 Story (U. S. Cir. Ct.), 659; *Veasey v. Doton*, 3 Allen (Mass.), 380; *Kerr on Fraud and Mistake*, 75.

⁶ *Jennings v. Broughton*, 17 Beav. 234; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1, 13; *Clark v. Everhart*, 63 Pa. St. 347; *Pratt v. Philbrook*, 33 Me. 17.

⁷ *Derry v. Peek*, L. R. 14 App. Cas. 337; *Blyth v. Samson*, 137 Pa. St. 367, 376; *Irving v. Thomas*, 18 Me. 418; *Savage v. Jackson*, 19 Ga. 305.

⁸ Exhaustive discussions of these elements are to be found in works on "Fraud" and "Torts."

⁹ *Middleton v. Middleton*, 1 Jac. & W. 94, 96; *Oldham v. Litchford*, 2 Vern. 506; *Mestaer v. Gillespie*, 11 Ves. 621, 638; *Jenkins v. Eldredge*, 3 Story (U. S. Cir. Ct.), 181; *Church v. Ruland*, 64 Pa. St. 432; *Cowperthwaite*

presentations he induced his ancestor to abstain from devising it to other persons, he will hold it in trust for those who would otherwise have been the devisees.¹ So, if heirs or devisees fraudulently prevent a testator from charging his property with legacies or annuities, they will take it burdened with a trust in favor of the intended annuitants or legatees.² And whenever one wrongfully intercepts a gift or contemplated transfer, which is designed for another, by promising directly or indirectly that he will hand it over to that other, he takes it in trust for the intended beneficiary.³ Equity will raise a trust to frustrate fraud, whether it springs from negation or positive act; and where that court finds one holding the legal estate or interest in property, which *ex equo et bono* he ought not to retain, it will convert him into a trustee for those to whom such property rightfully belongs.⁴

§ 378. **Trusts arising from Crime.** — It is in conformity to this general principle that constructive trusts are sometimes raised against those who seek to retain property obtained by them because of accident or the honest mistake of others.⁵ And, at the other extreme, it is the same principle which sometimes makes a thief or felon a trustee of that which he has obtained by his crime.⁶ Accordingly, it is held in England, New

v. Bank, 102 Pa. St. 397; *Whitehouse v. Bolster*, 95 Me. 458; *Fischbeck v. Gross*, 112 Ill. 208; *Scheffermeyer v. Schaper*, 97 Ind. 70.

¹ *Middleton v. Middleton*, 1 Jac. & W. 94, 96; *Dutton v. Poole*, 2 Lev. 211; *Reech v. Kennegal*, 1 Ves. Sr. 123; *McGowan v. McGowan*, 14 Gray (Mass.), 119.

² *Chamberlain v. Chamberlain*, Freeman, 34; *Huguenin v. Beasley*, 14 Ves. 273, 290; *Thynn v. Thynn*, 1 Vern. 296; *Hoge v. Hoge*, 1 Watts (Pa.), 163, 213. See *Matter of Will of O'Hara*, 95 N. Y. 403; *Amherst College v. Rich*, 151 N. Y. 282; *Fairchild v. Edson*, *Edson v. Bartow*, 154 N. Y. 199; *Edson v. Parsons*, 155 N. Y. 555; *Olliffe v. Wells*, 130 Mass. 221, 224.

³ *Barrow v. Greenbough*, 3 Ves. 152; *Podmore v. Gunning*, 7 Sim. 644; *Miller v. Pearce*, 6 Watts & S. (Pa.) 97; *Hoge v. Hoge*, 1 Watts (Pa.), 163, 213. See *Kine v. Farrell*, 71 N. Y. App. Div. 219.

⁴ Cases cited in preceding notes on this section; *Wallgrave v. Tebbs*, 2 Kay & J. 313; *Matter of Will of O'Hara*, 95 N. Y. 403; *Amherst College v. Rich*, 151 N. Y. 282; *Fairchild v. Edson*, *Edson v. Bartow*, 154 N. Y. 199; *Whitehouse v. Bolster*, 95 Me. 458; *Tucker v. Phipps*, 3 Atk. 359; *Eyton v. Eyton*, 2 Vern. 380; *Gaines v. Hennen*, 65 U. S. 553; *Ward v. Webber*, 1 Wash. (Va.) 274; *Schultz's Appeal*, 80 Pa. St. 396.

⁵ *Bingham v. Bingham*, 1 Ves. Sr. 126; *Pusey v. Desbouvrie*, 3 P. Wms. 316; *Midland Gt. West. R. Co. v. Johnson*, 6 H. L. Cas. 798, 811; *Fry v. Lane*, L. R. 40 Ch. Div. 312; *Goode v. Riley*, 153 Mass. 585; *Short v. Currier*, 153 Mass. 182.

⁶ *Nebraska Nat. Bk. v. Johnson*, 51 Neb. 546; *Grouch v. Hazlehurst L. Co.*, 16 So. Rep. (Miss.) 496. See *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591; *Ellerson v. Westcott*, 148 N. Y. 149, 153.

York and a few other states in this country, that a person who kills another in order to procure the latter's estate by descent or devise can not take the property; or, if he take it at all, he holds it in trust for the innocent and rightful owners.¹ In other states, such as Nebraska, Pennsylvania and Illinois, it is held that the crime does not affect the will or the rules of descent, but that the punishment of the murderer is to be inflicted solely by the criminal law.² While the latter of these views is perhaps the more technically accurate, the former seems to accord better with good morals and to be the more likely to produce the best equitable results.³

β. Constructive Trusts arising from Presumptive Fraud.

§ 379. **Nature and Causes of Such Trusts.** — In going beyond the scope of courts of law in regard to fraud, and presuming its existence under some circumstances, equity has recognized three additional forms of that wrong as causing constructive trusts. These are, (α) fraud presumed from the intrinsic nature of the transaction, (β) fraud presumed from the relations of the parties to the transaction, and (γ) fraud presumed or declared to exist as affecting third parties.⁴ It is in dealing with constructive trusts arising from these species of fraud that the beneficent and practically exclusive jurisdiction of courts of equity comes specially into play. The first group (α) may be illustrated by a conveyance of land for a grossly inadequate consideration,⁵ the second (β) by a gift of a trust interest from *cestui que trust* to trustee,⁶ and the third (γ) by a voluntary conveyance of property in defraud of creditors.⁷

§ 380. (α) **Constructive Trusts arising from Fraud presumed from the Intrinsic Nature of the Transaction—Inadequacy of Pur-**

¹ *Cleaver v. Mutual Res. F. L. Ass'n* (1892), 1 Q. B. 147; *Riggs v. Palmer*, 115 N. Y. 506; *Lundy v. Lundy*, 24 Can. Supr. Ct. 650; 36 Amer. Law Reg. n. s. 227; 41 Cent. Law Jour. 377.

² *Skellenberger v. Ransom*, 41 Neb. 631, 31 Neb. 61; *Carpenter's Estate*, 170 Pa. St. 203; *Holdom v. Ancient Order of U. W.*, 159 Ill. 619; *Owens v. Owens*, 100 N. C. 240; *Deen v. Millikin*, 6 Ohio Cir. Ct. 357.

³ See 36 Amer. Law Reg. n. s. 227; 41 Cent. Law Jour. 377; *Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591, 597.

⁴ *Chesterfield v. Janssen*, 1 Atk. 301, 1 Lead. Cas. Eq. 541; *Story, Eq. Jur.* § 258; *Bispham's Prin. Eq.* § 205.

⁵ *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; *Rosevelt v. Fulton*, 2 Cow. (N. Y.) 129; *Byers v. Surget*, 60 U. S. 303; *Gifford v. Thorn*, 9 N. J. Eq. 702.

⁶ *Adams v. Cowen*, 177 U. S. 471, 482, 484.

⁷ *Twyne's Case*, 1 Smith's Lead. Cas. 1; *Means v. Dowd*, 128 U. S. 273.

chase Price.—In *Chesterfield v. Janssen*,¹ Lord Hardwicke described one kind of fraud as that which is “apparent from the intrinsic value and subject of the bargain, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other.” An instance of such a bargain is a conveyance of property for a grossly inadequate consideration—for a price so small as to “shock the conscience” of the court²—for a compensation whose unfairness is “so gross and manifest that it is impossible to state it to a man of common sense without producing an exclamation at the inequality of it.”³ Mere inadequacy of consideration alone, where it is not unconscionably great and startling, will not cause a constructive trust to be raised on the presumption of fraud. Courts of equity, as well as those of law, will leave capable contracting parties free to reap advantage or suffer loss from an ordinary bargain.⁴ But when the insufficiency of the consideration is so manifest and glaring as to be in itself from a fair point of view an evidence of fraud, it will be so treated; and upon the presumption thus caused a constructive trust will emerge. Such cases are rare. But the instances are numerous in which other suspicious circumstances, though slight, when added to the fact of inadequacy of consideration, have given rise to constructive trusts.⁵ Thus, when the vendor who is not fairly paid is in pecuniary distress at the time of

¹ 1 Atk. 301, 2 Ves. Sr. 125, 155, 1 Lead. Cas. Eq. 541.

² *Coles v. Trecothick*, 9 Ves. 234, 246; *Underhill v. Horwood*, 10 Ves. 209; *Horsley v. Hough*, 38 Md. 130; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; *Eyre v. Potter*, 56 U. S. 42, 60; *Howard v. Edgell*, 17 Vt. 9; *Booker v. Anderson*, 35 Ill. 66.

³ Lord Thurlow, in *Gwynne v. Heaton*, 1 Bro. Ch. 8. And see *Hamet v. Dundass*, 4 Barr (Pa.), 178; *Gifford v. Thorn*, 9 N. J. Eq. 702; *Phillips v. Pullen*, 45 N. J. Eq. 830; *Brown v. Hall*, 14 R. I. 249; *Taylor v. Atwood*, 47 Conn. 498; *Case v. Case*, 26 Mich. 484; *Garrett v. Kan. City Coal Min. Co.*, 113 Mo. 330; *Boyce v. Fisk*, 110 Cal. 107.

⁴ *Harrison v. Guest*, 6 DeG. M. & G. 424, 8 H. L. Cas. 481; *Cockell v. Taylor*, 15 Beav. 103; *Erwin v. Parham*, 53 U. S. 197; *Slater v. Maxwell*, 73

U. S. 268; *Seymour v. Delancy*, 3 Cow. (N. Y.) 445; *Lee v. Kirby*, 104 Mass. 420; *Hemingway v. Coleman*, 49 Conn. 390; *Cummings's Appeal*, 67 Pa. St. 404; *Phillips v. Pullen*, 45 N. J. Eq. 830; *Cooper v. Reilly*, 90 Wis. 427; *Wood v. Craft*, 85 Ala. 260.

⁵ *Gwynne v. Heaton*, 1 Bro. Ch. 8; *James v. Morgan*, 1 Lev. 111; *Byers v. Surget*, 60 U. S. 303; *Eyre v. Potter*, 56 U. S. 42; *Hume v. United States*, 132 U. S. 406; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1; *Hodgson v. Farrell*, 15 N. J. Eq. 88; *Phillips v. Pullen*, 45 N. J. Eq. 830; *Taylor v. Atwood*, 47 Conn. 498; *Brown v. Hall*, 14 R. I. 249; *Howard v. Howard*, 87 Ky. 616; *Galbraith v. McLaughlin*, 91 Iowa, 399. And in some extreme cases, fraud on this ground has been recognized and relieved against even in courts of law. *Hume v. United States*, 132 U. S. 406.

his sale,¹ or is weak-minded² or very ignorant,³ or has been to some extent under the authority or domination of the purchaser,⁴ such a trust will readily be declared. Clear evidence of such circumstances readily shifts the burden of proof and fastens a trust upon him who has obtained large value for small consideration, unless he clearly convinces the court that no fraud of any kind was practised.⁵

§ 381. **Sale of Expectant Interest by Heir or Reversioner.** — Where one holds a temporary interest in property, such as a life estate or an estate as tenant for years, and another expects to obtain the land as heir and reversioner or remainderman, a sale, by the latter, of such future estate is looked upon with suspicion by a court of equity; and, if the consideration be inadequate, a constructive trust may be accordingly declared against the purchaser.⁶ The prospective heir is regarded as probably acting at a disadvantage, in that distress or need of present income may cause him to part with his inheritance for less than its fair value. It is clearly against public policy to permit others to take advantage of such circumstances.⁷ This class of cases, therefore, is simply one of the instances of those mentioned in the preceding paragraph — fraud is presumed, and a constructive trust raised from the inadequacy of price, coupled with the fact that the

¹ Cockell v. Taylor, 15 Beav. 103; Warfield v. Ross, 38 Md. 85.

² Clark v. Hanway, 2 P. Wms. 203; How v. Weldon, 2 Ves. Sr. 516; Allore v. Jewell, 94 U. S. 506; Rumph v. Abercrombie, 12 Ala. 64; Mann v. Betterley, 21 Vt. 326.

³ Pickett v. Loggon, 14 Ves. 215; Wood v. Abrey, 3 Madd. 417; Cookson v. Richardson, 69 Ill. 137; McKinney v. Pinkard, 2 Leigh (Va.), 149; Esham v. Lamar, 10 B. Mon. (Ky.) 43.

⁴ Gibson v. Jeyes, 6 Ves. 267; Brooks v. Berry, 2 Gill (Md.), 83; Griffith v. Godey, 113 U. S. 89, 95.

⁵ Cases cited in last five notes, *supra*; 1 Perry on Trusts, § 187; 1 Sug. V. & P. (8th Am. ed.) 119; Bispham's Prin. Eq. § 219.

⁶ Gowland v. De Faria, 17 Ves. 20; James v. Kerr, L. R. 40 Ch. Div. 449; Wright v. Wright, 51 N. J. Eq. 475; Chambers v. Chambers, 139 Ind. 111.

⁷ Earl of Aylesford v. Morris, 8 Ch.

Rep. 484, 490; O'Rorke v. Bolingbroke, L. R. 2 App. Cas. 814, 834; Fry v. Lane, L. R. 40 Ch. Div. 312, 320; Savery v. King, 5 H. L. Cas. 627; Varick v. Edwards, 1 Hoff. Ch. (N. Y.) 382; Powers' Appeal, 63 Pa. St. 443; Wright v. Wright, 51 N. J. Eq. 475; Larrabee v. Larrabee, 34 Me. 477; Butler v. Duncan, 47 Mich. 94; McClure v. Raben, 133 Ind. 507. The presumption being thus in favor of the heir, *because of his position*, the rule is the same when he is of full age. It is based, not upon any personal disability on his part, but upon the assumed stress of circumstances which causes him to sell his patrimony. Davis v. Marlborough, 2 Swanst. 113, 146; Addis v. Campbell, 4 Beav. 401. By some the rule is said to grow out of the assumption that such a transfer is a fraud on the ancestor. See Varick v. Edwards, 1 Hoff. Ch. (N. Y.) 382, 402.

subject-matter is the vendor's patrimony or expectancy. The courts have vacillated considerably in dealing with transfers like these. Some of the American decisions go to the extent of practically declaring such a sale by an heir, during the life of his ancestor, or the continuance of the temporary holding, to be void.¹ But the recent cases are much more liberal in dealing with these transactions.² On both sides of the Atlantic, the conclusion now appears to be that the burden rests on the purchaser of such an interest to show fairness and good faith on his part; and, this being proved by reasonably clear evidence, he may retain the property freed from any trust.³ When the father or ancestor joins with the heir in making the sale, or otherwise assists him in the transaction, or when the price received is substantially adequate, no trust will arise unless actual fraud or unfair dealing is proved.⁴

§ 382. Other Instances of Fraud presumed from the Nature of the Transaction are found in contracts tainted with usury,⁵

¹ *Boynton v. Hubbard*, 7 Mass. 112; *Poor v. Hazleton*, 15 N. H. 564; *Davidson v. Little*, 22 Pa. St. 245, 252; *McClure v. Raben*, 133 Ind. 507; *Hale v. Hollon*, 90 Texas, 427.

² *Kuhn's Appeal*, 163 Pa. St. 438; *Whelen v. Phillips*, 151 Pa. St. 312; *Cleending v. Wyatt*, 54 Kan. 523; American note to *Chesterfield v. Janssen*, 1 Lead. Cas. Eq. p. *541.

³ *Aylesford v. Morris*, 8 Ch. Rep. 484; *Fry v. Lane*, L. R. 40 Ch. Div. 312, 321; *James v. Kerr*, L. R. 40 Ch. Div. 449, 460; *Wright v. Wright*, 51 N. J. Eq. 475; *Chambers v. Chambers*, 139 Ind. 111; *Hale v. Hollon*, 90 Texas, 427. By the English statute 31 & 32 Vict. ch. 4, it is provided that no fair and *bonâ-fide* purchase of any reversionary interest in either realty or personalty shall be set aside merely on the ground of inadequacy of consideration. But it is held that this enactment still leaves the Court of Chancery free to set aside such transfers, where it can find any evidence of unfair dealing; and thus conveyances by heirs of their expectancies are retained under its protection. *Miller v. Cook*, L. R. 10 Eq. 641; *James v. Kerr*, L. R. 40 Ch. Div. 449, 460; *Rees v. De Bernardy* (1896), 2 Ch. 437.

⁴ *O'Rorke v. Bolingbroke*, L. R. 2 App. Cas. 814, 828; *Fitch v. Fitch*, 8 Pick. (Mass.) 480; *Nimmo v. Davis*, 7 Texas, 26; 1 Sugd. V. & P. 427. So conveyances of this kind in terminating disputes in families and making settlements are favored. *King v. Hamlet*, 2 Myl. & K. 456; *Kenney v. Tucker*, 8 Mass. 143; *Powers' Appeal*, 63 Pa. St. 443. But see *Needles v. Needles*, 7 Ohio St. 432. But mere knowledge or assent on the part of the ancestor, who does not join in the transaction nor assist in it in any way, does not seem to be sufficient to rebut the presumption of fraud or prevent the establishment of a constructive trust. Note to *Chesterfield v. Janssen*, 1 Lead. Cas. Eq. p. *541; *Aylesford v. Morris*, 8 Ch. Rep. 484, 491. See *Fry v. Lane*, L. R. 40 Ch. Div. 312, 321; *McClure v. Raben*, 133 Ind. 507; *Hale v. Hollon*, 90 Texas, 427.

⁵ *Aylesford v. Morris*, 8 Ch. Rep. 484; *Barrow v. Rhinelander*, 1 Johns. Ch. (N. Y.) 550; *Williams v. Fitzhough*, 37 N. Y. 444; *Buckingham v. Corning*, 91 N. Y. 525; *M. K. & T. Trust Co. v. Krumseig*, 40 U. S. App 620; *Munford v. McVeigh*, 92 Va. 446; *Sporrer v. Eifler*, 1 Heisk. (Tenn.) 633.

wagering contracts,¹ marriage brokerage contracts,² and conveyances or transfers, or agreements to make them, upon considerations or arrangements which would result in illegal restraint of marriage,³ or of trade,⁴ or in the improper procurement of public office,⁵ or which would in any other manner violate sound principles of law or public policy.⁶ Proceeding upon the general maxim, *ex turpi causâ non oritur actio*, both courts of law and those of equity refuse to enforce such agreements when executory.⁷ And when the outcome of any one of them has been the acquisition of the legal title to property, the retention of which would amount to the carrying out of such an illegal transaction or design, equity treats him who thus holds the title as a constructive trustee for the person or persons to whom it should rightfully belong.⁸ Placing these improper contracts and transfers under the general head of fraud in its broad, comprehensive sense, that

¹ Rawden v. Shadwell, Ambler, 269; Stat. 8 & 9 Vict. ch. 109, § 18; Embrey v. Jemison, 131 U. S. 336; Harvey v. Merrill, 150 Mass. 1; Lynch v. Rosenthal, 144 Ind. 86; Dauler v. Hartley, 178 Pa. St. 23.

² These are agreements made for negotiating marriages, and in most jurisdictions are held to be fraudulent and void. Cole v. Gilson, 1 Ves. Sr. 503; Duval v. Wellman, 124 N. Y. 156; White v. Nuptial Benefit Union, 76 Ala. 251; Story, Eq. Jur. § 263.

³ Scott v. Tyler, 2 Lead. Cas. Eq. p. * 144, and note; Stackpole v. Beaumont, 3 Ves. 89, 96; Smythe v. Smythe, 90 Va. 638; Bispham's Prin. Eq. §§ 225-227.

⁴ Mitchel v. Reynolds, 1 P. Wms. 181; Nordenfelt v. The Maxim, etc. (1894) App. Cas. 535; United States v. Freight Ass'n, 166 U. S. 290, 346; United States v. Joint Traffic Ass'n, 171 U. S. 505; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211; People v. North River Sugar Refining Co., 121 N. Y. 582; Diamond Match Co. v. Roeber, 106 N. Y. 473; Cohen v. Berlin & Jones Envelope Co., 166 N. Y. 292; Sternberg v. O'Brien, 48 N. J. Eq. 370, 372; Trenton Potteries v. Oliphant, 56 N. J. Eq. 680; Chicago Gas L. Co. v. People's Gas L. Co., 121

Ill. 530; Harrison v. Glucose Co., 116 Fed. Rep. 304, 309; Bispham's Prin. Eq. § 228.

⁵ Chesterfield v. Janssen, 1 Atk. 301, 1 Lead. Cas. Eq. p. * 541; Basket v. Mass., 115 N. C. 448; Bispham's Prin. Eq. § 229.

⁶ Wilkinson v. Wilkinson, L. R. 12 Eq. 604; Brown v. Peck, 1 Eden Ch. 140; Matter of Haight, 51 N. Y. App. Div. 310; Goodrich v. Tenney, 144 Ill. 422; Houlton v. Dunn, 60 Minn. 26; Lum v. McEwen, 56 Minn. 278.

⁷ "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is *Potior est conditio defendentis*." McMullen v. Hoffman, 174 U. S. 639, 654; Peters v. Mortimer, 4 Edw. Ch. (N. Y.) 279; Richardson v. Crandall, 48 N. Y. 348, 362; Snell v. Dwight, 120 Mass. 9; Scott v. Brown (1892), 2 Q. B. 724, 730.

⁸ Authorities cited in preceding notes on illegal contracts.

court affords the most adequate remedy for the injured party by raising in his favor a constructive trust. For the wrongdoing trustee is then compelled to re-convey the property, or the procedure by which he acquired it is declared to be null and void and set aside; and thus the legal estate is vested in the rightful owner.¹ In the absence of any controlling statute (*a*), and pursuant to the maxim, "he who seeks equity must do equity," the party who obtains such redress is also required to place the other party as nearly as possible *in statu quo*; as, for example, by repaying the principal of a usurious loan with legal interest upon the same.²

§ 383. (*β*) **Constructive Trusts arising from Fraud presumed or apprehended from the Relations or Circumstances of the Parties.** — Whenever the condition or position of one of the parties to a transaction is such that the other may have acquired an unfair advantage more easily than in ordinary cases, a court of equity will investigate the whole matter with scrupulous care, and readily presume fraud, unless its absence is clearly proved.³ Also, in order to prevent the possible though hidden or undiscoverable perpetration of such a wrong, that court will sometimes, under circumstances of this nature, declare a constructive trust to exist, without directly presuming any fraud.⁴ Apprehension of

(*a*) In New York, it is provided by statute that the "borrower" of money upon usurious interest may have redress in equity, without paying back or tendering any of the consideration received. R. S. 9th ed. p. 1856 (1 R. S. 772), § 8; L. 1837, ch. 430, § 4. But this statute, being in derogation of sound equitable principles, is very strictly construed. And any one other than the "borrower" personally must do equity, by restoring the amount of the loan with legal interest, in order to obtain relief. Such is the devisee or heir of the borrower, who has secured the loan by a usurious mortgage. The devisee, heir, or other holder of the land who thus takes it subject to the mortgage, must pay or tender the principal of the debt with legal interest, in order to obtain an equitable decree for the cancellation of the mortgage. *Buckingham v. Corning*, 91 N. Y. 525.

¹ That is, the ordinary equitable remedy of restitution is granted, § 373, *supra*.

² *Walker v. Dalt*, 1 Ch. Cas. 276; *Buckingham v. Corning*, 91 N. Y. 525; *Bispham's Prin. Eq.* § 222.

³ In *Chesterfield v. Janssen*, 2 Ves. Sr. 125, Lord Hardwicke said that the "third species of fraud may be presumed from the circumstances and condition of

the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed." *Hoghton v. Hoghton*, 15 Beav. 278; *Taylor v. Taylor*, 49 U. S. 183; *Union Pacific R'way v. Harris*, 158 U. S. 326; 1 *Perry on Trusts*, § 194; 2 *Story, Eq. Jur.* § 239.

⁴ *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252, 259; *Moore v. Moore*, 5

fraud is the *causa ultima* of all constructive trusts which arise merely from the relations or circumstances of the parties. In some cases it exists *only as an apprehension*, while in others it becomes so strong as to merge into a *presumption*. Thus, when a trustee purchases the trust property at his own sale of the same, a constructive trust is ordinarily declared in order to *prevent* possible fraud, because of the aversion of equity to letting a trustee occupy a position in which he might so easily commit fraud without fear of detection;¹ while a gift of land from a client to his attorney, who is conducting legal proceedings relative to such land, is *presumed* to be fraudulent and becomes the basis of a constructive trust.² Since the shadow of the same wrong falls through the windows of Equity athwart all such cases, and they all involve the same kinds and classes of parties, logically they are all to be discussed in the same chapter.

§ 384. **Mental Weakness, Drunkenness, Duress, Undue Influence.** — One of the clearest groups of instances of this character is that of contracts between parties, one of whom is affected by mental weakness, intoxication, undue influence, duress, fear, apprehension, or extreme distress.³ Mere weakness of intellect alone, when there is no confidential relation between the contracting parties and they deal "at arm's length," is not a sufficient ground for the interference of equity;⁴ nor is a state of drunkenness, which does not make the person substantially *non compos mentis*.⁵ But when

N. Y. 256; *People v. Open Board of Stock Brokers' Building Co.*, 92 N. Y. 98; *Scholle v. Scholle*, 101 N. Y. 167; *Corbin v. Baker*, 167 N. Y. 128; *Yeackle v. Litchfield*, 13 Allen (Mass.), 417, 419; *Rich v. Black*, 173 Pa. St. 92, 99; *Beckley v. Schlag*, 46 N. J. Eq. 533; *Taylor v. Calvert*, 138 Ind. 67; *Fox v. Macreth*, 1 Lead. Cas. Eq. 115, note; *Hill on Trustees*, 248, note; *Bispham's Prin. Eq.* § 94.

¹ See cases cited in last preceding note, also § 387, *infra*.

² *Holmes v. Loynes*, 4 DeG. M. & G. 270; *Morgan v. Minot*, L. R. 6 Ch. Div. 638; *Newman v. Payne*, 2 Ves. 199, 200; *Greenfield's Est.*, 14 Pa. St. 489, 506; § 390, *infra*.

³ *Ralston v. Turpin*, 129 U. S. 663; *Neilson v. McDonald*, 6 Johns Ch. (N. Y.) 201, 210; *Oak v. Dustin*, 79

Me. 21; *Hill on Trustees*, 156; Co. Lit. 447 a.

⁴ *Osmond v. Fitzroy*, 3 P. Wms. 129; *Hyer v. Little*, 20 N. J. Eq. 443; *Lozear v. Shields*, 23 N. J. Eq. 509; *Aiman v. Stout*, 42 Pa. St. 114; *Ex parte Allen*, 15 Mass. 58; *Mann v. Betterly*, 21 Vt. 326; *Rogers v. Higgins*, 57 Ill. 244, 247; *Stiner v. Stiner*, 58 Barb. (N. Y.) 643. But, of course, a very great lack of mental ability, such as results in idiocy or insanity, renders the contract void, or at least voidable, in any court having jurisdiction of the subject-matter.

⁵ *Gore v. Gibson*, 13 M. & W. 623; *Cory v. Cory*, 1 Ves. Sr. 19; *Selah v. Selah*, 23 N. J. Eq. 185; *Gombault v. Public Adm'r*, 4 Bradf. (N. Y.) 226; *Fluck v. Rea*, 51 N. J. Eq. 233; *In re Schusler's Est.*, 198 Pa. St. 81.

one of the parties is so intoxicated or so mentally deficient as to lead the court to believe that he probably does not know what he is doing, the presumption is against the other party to the contract; and he must fairly clear himself of all imputation of fraud, or have a constructive trust raised against the property which he has acquired by the transaction.¹ And, as was explained heretofore,² mental incapacity much less than this, from whatever cause it may proceed, and whether temporary or permanent, may be enough to raise such a trust, when it is coupled with the fact of inadequacy of consideration, or there are other slight circumstances indicating that the stronger mind may have taken an unfair advantage of the weaker.³ So, not only those grosser forms of duress for which there is a remedy in a court of law, — duress of imprisonment, or *per minas*, or by threats against life or limb,⁴ — but also the more subtle duress of the volition, called “equitable duress,” and such influence as is “undue,” which without direct force or bodily constraint compels a person to do something that he does not wish to do, will move a court of equity to imply a constructive trust in his favor;⁵ “for in cases of this sort he has no free will, but stands *in vinculis*.”⁶ “As between parties occupying no relation of confidence in or toward each other, or of control by reason of position, employment, or otherwise, undue influence can rarely be imputed without showing some degree of fear, or threats, or advantage taken of position, or unfair practices

¹ *Gore v. Gibson*, 13 M. & W. 623; *Johnson v. Mellicott*, 3 P. Wms. 130, note; *Thackrah v. Haas*, 119 U. S. 499; *Selah v. Selah*, 23 N. J. Eq. 185; *Mansfield's Case*, 12 Rep. 123; *Howe v. Howe*, 99 Mass. 88; *Helbreg v. Schumann*, 150 Ill. 12; *Hill on Trustees*, 46.

² §§ 380–382, *supra*.

³ *Allore v. Jewell*, 94 U. S. 506, 511; *Griffith v. Gody*, 113 U. S. 89, 95; *Ralston v. Turpin*, 129 U. S. 663; *Dundee Chem. Works v. Connor*, 46 N. J. Eq. 576; *Borden v. White*, 44 N. J. Eq. 291; *Raw v. Von Zedlitz*, 132 Mass. 164; *Churchill v. Scott*, 65 Mich. 485; *Yount v. Yount*, 144 Ind. 133; *Stepp v. Frampton*, 179 Pa. St. 284; *Highberger v. Stiffler*, 21 Md. 338; *Brice v. Brice*, 5 Barb. (N. Y.) 533, 549; *Maggini v. Pezzoni*, 76 Cal. 631; *Jones v. Thompson*, 5 Del. Ch. 374; *Rees v. De Ber-*

nardy (1896), 2 Ch. 437; 1 *Perry on Trusts*, §§ 190, 191; *Hill on Trustees*, 155.

⁴ *Ripley v. Gelston*, 9 Johns. (N. Y.) 201; *Guilleaume v. Rowe*, 94 N. Y. 268; *Elliott v. Swartwout*, 35 U. S. 137; *Fairbanks v. Snow*, 145 Mass. 153; *Heaps v. Dunham*, 95 Ill. 583; *Motz v. Mitchell*, 91 Pa. St. 114; 1 *Blackst. Com.* p. *131.

⁵ *Williams v. Bayley*, L. R. 1 Eng. & Ir. App. 218; *Eadie v. Slimmon*, 26 N. Y. 9; *McCandless v. Engle*, 51 Pa. St. 309; *Dolliver v. Dolliver*, 94 Cal. 642; *Bryant v. Peck & Co.*, 154 Mass. 460; *Bell v. Campbell*, 123 Mo. 1; *Fry v. Lane*, L. R. 40 Ch. Div. 312, 322; *Chicago, etc. R. Co. v. Belliwith*, 55 U. S. App. 113; *Jones v. A. & V. R. Co.*, 72 Miss. 22.

⁶ 2 *Story, Eq. Jur.* § 239.

or persuasion, involving in some degree a species of fraud. But when any of these elements enter into and constitute part of the circumstances attending a transaction, and controlling the will of a party making a deed or other contract, courts of equity have long been accustomed to give relief.¹

§ 385. **Confidential Relations.**— But the most numerous and important groups of cases, in which constructive trusts are brought into being in the manner now under discussion, are those in which some confidential relation exists between the contracting or interested parties. Such are the relations between trustee and *cestui que trust*, guardian and ward, attorney and client, parent and child, husband and wife, principal and agent, directors of a corporation and the corporation itself and its stockholders, minister or priest and parishioner, tenants in common, joint-tenants, or other co-owners of property, employer and employee, partners, close friends, intimate neighbors, and the like. Equity looks with suspicion upon agreements and transactions between such person; and, when the outcome is that he in whom the confidence is reposed acquires property from or through the other, frequently either the arrangement is wholly set aside without proof, or the burden of showing the fairness of the contract is thrown upon him who has acquired the legal estate, or, if he fail to prove this, he is declared to hold the property as constructive trustee for the other party.² Each of the most important of these relations requires a separate discussion. There are three of them to be first discussed, the existence of either of which alone is sufficient to create a presumption against the fiduciary party who seeks to acquire for his own benefit the property affected by the trust or confidence. These are the relations of trustee and *cestui que trust*, guardian and ward, and attorney and client. The other confidential relations above stated call for careful scrutiny by the court; and, while neither of them alone will ordinarily be ground for implying a trust,

¹ Per Smith, J., in *Eadie v. Slimmon*, 26 N. Y. 9, 11; *Adams v. Irving Nat. Bk.*, 116 N. Y. 606; *Peyser v. Mayor*, 70 N. Y. 497, 501; *Osborn v. Robbins*, 36 N. Y. 365; *Bispham's Prin. Eq.* 230; 1 *Perry on Trusts*, § 192.

² "The ground of this rule is, that the danger of allowing persons holding such relations of trust and influence with others to deal with them is so

great that the presumption ought to be against the transaction, and the person holding the trust or influence ought to be required to vindicate it from all fraud, or to continue to hold the property in trust for the benefit of the ward, *cestui que trust*, or other person holding a similar relation." 1 *Perry on Trusts*, § 194.

yet, with other suspicious circumstances though often very slight, they will give rise to such an implication.

§ 386. **Trustee and Cestui que Trust.** — The trustee of an active trust, because of his control of the property and superior knowledge concerning it, usually has an important advantage over the beneficiaries. His position also naturally gives to him an ascendancy and influence over their minds, which is apt to be powerfully available in his favor. Therefore, when he purchases a beneficial interest in the property from the *cestui que trust*, or obtains a gift of it *inter vivos* from him, it is presumed in equity that these advantages have been unfairly utilized;¹ and the burden is accordingly placed upon the purchaser or donee to prove that he dealt honestly and in perfect good faith, and that the other party acted freely, and was fully and fairly informed of all the circumstances, such as the value of the property, present or prospective, the conditions and rights of all the parties, and all other matters by which the transaction was affected, or could reasonably be expected to be influenced.² In other words, such a sale or gift shifts the ordinary burden of proof. And when the vendor or donor comes into equity, praying that a constructive trust in the property be declared in his favor on the ground of fraud, he succeeds, unless the donee or vendee clearly proves that the entire transaction on his part was fair, open, and above-board. In order that the transfer shall stand, the court must be convinced that no special knowledge of the trustee, nor any ignorance or disability on the part of the *cestui que trust*, nor any influence unduly exercised by the former over the latter, materially affected the gift or sale.³

These things can be most easily proved by the trustee, other circumstances being the same, when he has purchased the

¹ *Coles v. Trecothick*, 9 Ves. 234; *Dougan v. McPherson* (1902), App. Cas. 197; *Adams v. Cowen*, 177 U. S. 471, 484; *Goldsmith v. Goldsmith*, 145 N. Y. 313; *Ryle v. Ryle*, 41 N. J. Eq. 582; *Wright v. Smith*, 23 N. J. Eq. 106; *Smith v. Townshend*, 27 Md. 368; *Fox v. Macreth*, 1 Lead. Cas. Eq. 115, note; 1 *Perry on Trusts*, § 195; *Hill on Trustees*, 158.

² Cases cited in last preceding note; *Spencer's Appeal*, 80 Pa. St. 317, 332; *Cadwallader's Appeal*, 64 Pa. St. 293; *Smith v. Drake*, 23 N. J. Eq. 302;

Yonge v. Hooper, 73 Ala. 119; *Cole v. Stokes*, 113 N. C. 270; *Bispham's Prin. Eq.* § 237.

³ *Mott v. Mott*, 49 N. J. Eq. 192, 199; *Hammell v. Hyatt*, 59 N. J. Eq. 174; *Coombe's Ex'r v. Carthew*, 59 N. J. Eq. 638; *Wright v. Smith*, 23 N. J. Eq. 106; *Graves v. Waterman*, 63 N. Y. 657; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252, 258; *Miggett's Appeal*, 109 Pa. St. 520; *Darlington's Estate*, 147 Pa. St. 624; 1 *Perry on Trusts*, § 195; *Bispham's Prin. Eq.* § 237.

realty for a full and adequate consideration. And, the less the purchase price in proportion to the fair market value of the property, the greater, as a rule, is the burden of proof which rests upon him. Hence, that burden is heaviest in case of a gift *inter vivos*, a pure gratuity from the beneficial owner, who is living and might personally enjoy the property if he did not give it away.¹ It is natural and right that the presumption against the freedom and fairness of a gift under these conditions should be very strong. Still it is well settled that the trustee, in such a case, by affirmatively showing absolute good faith and fair dealing on his own part, full disclosure by him of all the attending facts and circumstances, and complete freedom and facility of action on the part of the *cestui*, may establish his right to retain the property for his own benefit.²

When, on the other hand, the *cestui que trust* by his *will* makes a devise or legacy to his trustee, it is decided by most of the authorities that, while the relationship of the parties is a circumstance of suspicion to be given due weight in a contest over this provision of the will, yet it is not in and of itself sufficient to shift the burden of proof upon the donee by creating a presumption of fraud against him.³ The *cestui que trust* at his death *must* let the property pass over to some one. And it is not unnatural, when he himself can no longer enjoy its benefits, that he should desire to give it to one who has shown him-

¹ *Adams v. Cowen*, 177 U. S. 471; *Barnard v. Gantz*, 140 N. Y. 249, 256; *Green v. Roworth*, 113 N. Y. 462; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 353; *Gibbs v. N. Y. L. Ins. Co.*, 67 How. Pr. 207; *Haydock v. Haydock*, 34 N. J. Eq. 570; *Wright v. Vanderplank*, 8 DeG. M. & G. 133, 137; *Hoghton v. Hoghton*, 15 Beav. 278; *Morley v. Loughman* (1893), 1 Ch. 736; *Taylor v. Taylor*, 49 U. S. 183; *Wistar's Appeal*, 54 Pa. St. 60, 63; *Davis v. Strange*, 86 Va. 793; *Soberanes v. Soberanes*, 97 Cal. 140; *Ross v. Conway*, 92 Cal. 632.

² *Cowee v. Cornell*, 75 N. Y. 91, 100; *Pierce v. Pierce*, 71 N. Y. 154; *Matter of Will of Smith*, 95 N. Y. 516, 522; *Nesbit v. Lockman*, 34 N. Y. 167; *Al-leard v. Skinner*, L. R. 36 Ch. Div. 145; 1 *Perry on Trusts*, § 195; *Bispham's Prin. Eq.* § 231.

³ *Bancroft v. Otis*, 91 Ala. 279; *Eastis v. Montgomery*, 93 Ala. 293; *Matter of Will of Smith*, 95 N. Y. 516; *Loder v. Whelpley*, 111 N. Y. 239, 250; *Matter of Cornell*, 43 N. Y. App. Div. 241, *aff'd* 163 N. Y. 608; *In re Adams' Estate*, 201 Pa. St. 502; *Scattergood v. Kirk*, 195 Pa. St. 195; *Harp v. Parr*, 168 Ill. 459; *Mackall v. Mackall*, 135 U. S. 167, 172, 2 Lead. Cas. Eq. 582. *Contra*, i. e., that such relations between testator and beneficiary do change the burden of proof. *Hegnoy v. Head*, 126 Mo. 619; *Griffin v. Diffendorfer*, 50 Md. 466. And see *Kischman v. Scott*, 166 Mo. 214; *Berberet v. Berberet*, 131 Mo. 399; *Fulton v. Andrews*, L. R. 7 Eng. & Ir. App. 448, 461; *Tyrell v. Painton* (1894), Prob. 151, 157.

self to be an honest and capable trustee. Besides, the donees under a will are usually not present when it is executed; and it would be unreasonable to place upon them the burden of proof concerning a matter of which they may have no knowledge, and possibly no means of acquiring knowledge.¹ A mere passive or dry trustee, moreover, since his position gives him no advantage over the beneficiaries, may take by any form of purchase or donation from them, without thereby occasioning a presumption of fraud or a constructive trust.²

§ 387. **Trustee's Purchase of Trust Property.** — The basal principle, which operates in shifting the burden of proof as here explained, is that a trustee shall not use his position to make any profit for himself out of the trust estate.³ An expression of the same principle, even more emphatic, occurs when a trustee with power to sell the trust property executes the power and purchases at his own sale. For, with the apprehension of fraud in the background, but without actually presuming its existence, a court of equity, at the option of the *cestui que trust*, and for the purpose of keeping its favorite, the trustee, aloof from a position where he could so easily commit undiscoverable wrong, will treat him as still holding the property in trust for the same beneficiary or beneficiaries as before.⁴ This it will do whether the purchase is at private sale or public auction,⁵ directly by the trustee himself or indirectly through the medium of one or more third parties.⁶ And the same stringent rule applies to every one, whether technically called

¹ Bancroft v. Otis, 91 Ala. 279; Matter of Will of Smith, 95 N. Y. 516.

² Parkes v. White, 11 Ves. 209, 226; Inlow v. Christy, 187 Pa. St. 186, 191. See Fletcher v. Bartlett, 157 Mass. 113.

³ Hill on Trustees, 159; 1 Lead. Cas. Eq. (4th Am. ed.) 62 Amer. note.

⁴ Downes v. Grazebrook, 3 Mer. 200; Farrar v. Farrar, L. R. 40 Ch. Div. 395, 409; Dougan v. McPherson (1902), App. Cas. 197; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; De Caters v. Le Ray De Chaumont, 3. Paige Ch. (N. Y.) 178; Fulton v. Whitney, 66 N. Y. 548; Dodge v. Stevens, 94 N. Y. 209; Amherst College v. Rich, 151 N. Y. 282, 340; Kahn v. Chapin, 152 N. Y. 305, 309; Hammond v. Hopkins, 143 U. S. 224; Yeackel v. Litchfield, 13 Allen (Mass.), 417, 419;

Morse v. Hill, 136 Mass. 60; Rich v. Black, 173 Pa. St. 92, 99; Taylor v. Calvert, 138 Ind. 67; Scott v. Umberger, 41 Cal. 410, 419; Fox v. Mackreth, 1 Lead. Cas. Eq. 115; 1 Perry on Trusts, § 195.

⁵ Campbell v. Walker, 5 Ves. 678, 680, 13 Ves. 601; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252; Boerum v. Schenck, 41 N. Y. 182; Adams v. Cowen, 177 U. S. 471; French v. Pittsburgh Vehicle Co., 184 Pa. St. 161, 163; Ives v. Ashley, 97 Mass. 198; Broder v. Conklin, 121 Cal. 282.

⁶ Moore v. Moore, 5 N. Y. 256; People v. Open Board of Stock Brokers, Building Co., 92 N. Y. 98; Bassett v. Shoemaker, 46 N. J. Eq. 538; DeCelis v. Porter, 59 Cal. 464; Gibson v. Barbour, 100 N. C. 192.

trustees or not, such as executors, administrators, mortgagees, attorneys, agents, and the like, who assume to buy property for themselves, under circumstances fiduciary or confidential which impose upon them the duty of acting disinterestedly for others.¹ Thus, where a son was employed as agent by his father to buy land at the sale on foreclosure of a mortgage held by the latter, and the *maximum* price which he should bid was fixed at \$15,000, a purchase of it by him, or for him through a third party, for \$16,000, was held to be in trust for the father and his heirs at their election.² The agent, being in the affair to act for the benefit of another, could not use his position to his own advantage, if the principal chose to treat the transaction as his own.³ So a conveyance by an executor, acting under a power of sale in the will, to a person having the same surname as himself, and a deed for practically the same consideration as the other from such person to the executor within four days thereafter, both instruments being recorded at substantially the same time, were held to be facts sufficient to justify one in refusing subsequently to complete a contract to purchase from the executor individually, on the ground that he held the land as a constructive trustee for his original beneficiaries.⁴ In this class of cases there is more than the mere shifting of the burden of proof upon the fiduciary. Having acted without any authorization from the court, he is not even permitted to prove, against the wish of the beneficiaries, that he has fairly acquired the trust property for himself; but they, at their own election and without more, may fasten a constructive trust upon it in his hands.⁵

This absolute right of the *cestuis que trustent* may of course be waived or relinquished by them,⁶ or lost by their laches or by lapse of time.⁷ And, where the trustee has an interest of

¹ Adams v. Cown, 177 U. S. 471; Hill on Trustees, 428, and notes; 1 Perry on Trusts § 195, and notes.

² Moore v. Moore, 5 N. Y. 256.

³ Moore v. Moore, 5 N. Y. 256, 261; Morse v. Hill, 136 Mass. 60; Bassett v. Shoemaker, 46 N. J. Eq. 538.

⁴ People v. Open Board of Stock Brokers Bld'g Co., 92 N. Y. 98.

⁵ Campbell v. Walker, 5 Ves. 678, 680; Davoue v. Fanning, 2 Johns. Ch. (N. Y.) 252, 259-261; Moore v. Moore, 5 N. Y. 256, 261; Fulton v. Whitney, 66 N. Y. 548; Scholle v. Scholle,

101 N. Y. 167, 171; Ives v. Ashley, 97 Mass. 198; Bassett v. Shoemaker, 46 N. J. Eq. 538; Bispham's Prin. Eq. § 94; 1 Perry on Trusts, § 195.

⁶ Hoyt v. Latham, 143 U. S. 553; Hammond v. Hopkins, 143 U. S. 224; Harrington v. Erie Co. Savings Bk., 101 N. Y. 257; Yeackel v. Litchfield, 13 Allen (Mass.), 417, 419; Ives v. Ashley, 97 Mass. 198; Plucker v. Teller, 174 Pa. St. 529; Pearce v. Gamble, 72 Ala. 341; 1 Perry on Trusts, § 197. See Kullman v. Cox, 167 N. Y. 411.

⁷ Kahn v. Chapin, 152 N. Y. 305;

his own to protect by bidding at the sale of the trust property, as, for example, where he has an individual part ownership therein, and he makes special application to the court for permission to buy for himself, which, upon the hearing of all those who are interested, or their being given their day in court and full opportunity to be heard, is duly granted, "then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title."¹ But a constructive trust may fasten upon his purchase, if he fail to comply exactly with all these requisites. He can not, for instance, rely on the formal leave to buy which is usually given to all the parties by the decree in a foreclosure or partition suit.² His application must be *special*, and with everybody in court who could have any ground to object. "The³ power resides in the court to relieve from the rule."⁴ And it has been held in New York, by a decision, which if it does not undermine the principle of protection to the beneficiaries may at least break down some of its fortifications, that, if every one in interest be thus specially brought before the court, it may grant such relief *by confirming a purchase by a trustee*, who had a personal interest to protect, but who did not obtain before the sale any judicial authorization to bid in his own behalf.⁵

When a sale has been honestly made to an outside party, the trustee acting *bona fide* may, thereafter, validly purchase from or through him without any sanction of the court.⁶ And it is held by the United States Supreme Court, and in some states, though strongly denied in others,⁷ that he may pur-

Hammond v. Hopkins, 143 U. S. 224; Hopper v. Hopper, 79 Md. 400; Harrison v. Manson, 95 Va. 593; Thompson v. Hartline, 105 Ala. 263; Darling v. Potts, 118 Mo. 506; Barber v. Bowen, 47 Minn. 118; *In re* Boles & British Land Co. (1902) 1 Ch. 244; Bispham's Prin. Eq. § 94.

¹ Scholle v. Scholle, 101 N. Y. 167, 172; Corbin v. Baker, 167 N. Y. 128, 133; Colgate's Executor v. Colgate, 23 N. J. Eq. 372; Markle's Estate, 182 Pa. St. 378; Boswell v. Coaks, L. R. 23 Ch. Div. 302, 310; Farmer v. Dean, 32 Beav. 327; 1 Perry on Trusts (5th ed.), § 195, note (a).

² Fulton v. Whitney, 66 N. Y. 548; Torrey v. Bank of Orleans, 9 Paige (N. Y.), 649; Boswell v. Coaks, L. R. 23 Ch. Div. 302, 310.

³ Authorities cited in last two preceding notes. If they use trust funds in the purchase, the profit of a resale belongs to the *cestui que trust*. Baker's Appeal, 120 Pa. St. 33.

⁴ Corbin v. Baker, 167 N. Y. 128, 134.

⁵ Corbin v. Baker, 167 N. Y. 128. See Kullman v. Cox, 167 N. Y. 411; Kirsch v. Tozier, 143 N. Y. 390.

⁶ Welch v. McGrath, 59 Iowa, 519. And see Patterson v. Leming, 118 Pa. St. 571; Stewart v. Fellows, 128 Ill. 480. But, of course, such transactions are scrutinized by the courts with the most rigid care; and it must be very clear that the trustee was not personally interested in the first purchase.

⁷ Marshall v. Carson, 38 N. J. Eq. 250; Hill on Trustees, 160, 250.

chase directly at the sale when it is not by or for him, but by some independent party, as when it is made pursuant to an adverse judgment or decree.¹

§ 388. **Trustee's Purchase of Encumbrance — Renewal of Lease in his own Name.** — As one who occupies a fiduciary position can not acquire a clear title to the trust property, except under such circumstances as those explained in the preceding paragraph, so he can not obtain for his own benefit, save under like conditions, any claim, encumbrance, or outstanding lien against or interest in that property.² Being trustee, he must act wholly for the trust. Many other illustrations of this salutary principle are supplied by the authorities. But the only one which needs to be added here is that of a renewal of a lease in his own name by one who holds it in a fiduciary or quasi-fiduciary capacity. Such renewal enures to the benefit of the *cestui que trust*, or other party beneficially interested in the original leasehold.³ In the famous "Rumford Market Case,"⁴ it was so decided, although the trustee, who ultimately took the new lease in his own name and ostensibly for his own benefit, at first attempted to obtain a renewal expressly for the benefit of the *cestuis que trustent*, who were infants, and the landlord refused to grant it in that form, because, under the circumstances, he would then have had no means of enforcing payment of the rent. And, in cases like that of "The Hoffman House," in New York,⁵ where one partner has endeavored for himself alone to renew a lease owned and controlled by the

¹ Allen v. Gillett, 127 U. S. 589; Fisk v. Sarber, 6 W. & S. (Pa.) 18; Bruner v. Finley, 187 Pa. St. 389; Hall v. Bliss, 118 Mass. 554. But here again it must be perfectly clear to the court that the trustee has acted in entire good faith, and not availed himself of any advantage growing out of his position. See Mullen v. Doyle, 147 Pa. St. 512; Parshall's Appeal, 65 Pa. St. 234.

² Parkist v. Alexander, 1 Johns. Ch. (N. Y.) 394; Dickey's Appeal, 73 Pa. St. 218, 247; Baker v. Whiting, 3 Sumn. (U. S. Cir. Ct.) 475; Wellford v. Chancellor, 5 Gratt. (Va.) 39. See Kennedy v. De Tafford (1896), 1 Ch. 762.

³ Keech v. Sandford, 1 Lead. Cas. Eq. 44; Hill v. Hill, 3 H. L. Cas. 828; Mitchell v. Reed, 61 N. Y. 123, 84

N. Y. 556; McGuire v. Devlin, 158 Mass. 63; Jones's Estate, 179 Pa. St. 36; Wood v. Irwin, 163 Pa. St. 413, 414; Petrie v. Badenoch, 102 Mich. 45; Crone v. Crone, 180 Ill. 599. And this principle applies to all cases in which, by virtue of the existence of the original lease, a renewal has been obtained by one person to the detriment of another who had an interest in the same. *In re Lulham*, 53 L. J. Ch. n. s. 928, 931; Mitchell v. Reed, 61 N. Y. 123, 84 N. Y. 556.

⁴ Keech v. Sandford, 1 Lead. Cas. Eq. 44, called the Rumford Market Case, because the lease was of the market-place of that name.

⁵ Mitchell v. Reed, 61 N. Y. 123, 84 N. Y. 556.

firm, he has uniformly been held, on application of the other members, to be a constructive trustee for all the partners.¹ This application of the principle, which forbids a trustee to profit by his position, is uniformly adhered to on both sides of the Atlantic.² But an exception appears under circumstances such as arose in Pennsylvania, where a landlord refused to renew a lease of a colliery unless there was taken with it another colliery, the leasing and operating of which would call for the outlay of large additional sums of money. The first lease — of the one colliery — being held by a trustee, it was decided that he acted properly in refusing to risk the trust moneys in the larger enterprise. And he having taken the new and more extensive lease with his own funds, and the entire transaction being proved to be fair and *bona fide*, it was held that no trust was to be raised by equitable construction against him.³ It follows that, where the lease can not be renewed and held for the *cestuis* without running counter to the well-settled principles which govern the conduct of trustees, the fiduciary holder is free from the operation of the rule which would otherwise preclude him from taking a renewal for his own benefit.

§ 389. **Conclusion as to Trustee and Cestui Que Trust.** — The cases here given, in which equity raises constructive trusts because of the apprehension of fraud, are simply the most important instances of the operation of a general rule. And that rule makes the court quick to afford a remedy, through the medium of such a trust, whenever one party occupies a position towards another which would enable him readily to commit fraud without likelihood of detection. It applies, not only to the technical position of trustee and *cestui que trust*, but also, to a greater or less degree, according to the closeness of the confidence, to all the fiduciary and quasi-fiduciary relationships discussed in this chapter.⁴

¹ See also *In re Lulham*, 53 L. J. Ch. n. s. 928; *Palmer v. Young*, 1 Vern. 276; *Winslow v. Tighe*, 2 Ball & B. 195; *Featherstonaugh v. Fenwick*, 17 Ves. 298; *Crone v. Crone*, 180 Ill. 599; *Keech v. Sandford*, 1 Lead. Cas. Eq. 44, Amer. note.

² Authorities cited in last three preceding notes.

³ *In re Markle's Estate*, 182 Pa. St. 378.

⁴ *Turner v. Sawyer*, 150 U. S. 578; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388, 409; *Tanney v. Tanney*, 159 Pa. St. 277; *Fellows v. Loomis*, 170 Pa. St. 415; *Hyndman v. Hyndman*, 19 Vt. 9; *McHan v. Ordway*, 76 Ala. 347. And see *Stevens v. Reynolds*, 143 Ind. 467; *Kennedy v. De Trafford* (1896), 1 Ch. 762.

§ 390. **Attorney and Client.** — The operation of the rules above discussed is so strong between attorney and client, because of the powerful influence which the former is supposed to exercise over the mind of the latter, that it has been said, in some cases, that they can not make any valid contract between them concerning the subject-matter of the litigation or proceeding in which the attorney is acting.¹ This is probably too extreme a statement.² But a gift *inter vivos* of such property from client to attorney, or a purchase of it by the latter, whether directly from the client or at a judicial or official sale, places upon him the heaviest possible burden of proof short of that which is absolutely prohibitory.³ A client may give property to his attorney *by will* without thereby alone causing any presumption of fraud.⁴ They may fairly contract with each other concerning property over which the attorney as such is exercising no control or influence; and so they contract as strangers.⁵ And after the relation has ceased, and its influence can no longer be supposed to be operative, they can deal with each other at arms' length.⁶ Thus, they may so deal when the attorney has ceased to act as such for his former client and is suing him for fees, or, as a creditor, is otherwise pressing him.⁷ But when it is at all probable that the confidential position

¹ *Wright v. Proud*, 13 Ves. 136, 138; *Holman v. Loynes*, 4 DeG. M. & G. 270; *Tyrrell v. The Bank of London*, 10 H. L. Cas. 26; *Frank's Appeal*, 59 Pa. St. 190; *Roby v. Colehour*, 135 Ill. 300; *Rogers v. Marshall*, 3 McCrary (U. S. Cir. Ct.), 76.

² *Liles v. Terry* (1895), 2 Q. B. 679; *Nesbit v. Lockman*, 34 N. Y. 167, 169; *Whitehead v. Kennedy*, 69 N. Y. 462, 466; *Story*, Eq. Jur. § 311.

³ *O'Brien v. Lewis*, 9 Jur. (n. s.) 528; *Newman v. Payne*, 2 Ves. 199; *Liles v. Terry* (1895), 2 Q. B. 679; *Nesbit v. Lockman*, 34 N. Y. 167; *Matter of Demarest*, 11 N. Y. App. Div. 156; *United States v. Coffin*, 83 Fed. Rep. 337; *Mott v. Harrington*, 12 Vt. 199; *Smith v. Brotherline*, 62 Pa. St. 461; *Trotter v. Smith*, 59 Ill. 240; *Donohoe v. Chicago Cricket Club*, 52 N. E. Rep. (Ill.) 351. It is said by some authorities that a gift of this character is absolutely void. See *Bispham's Prin. Eq.* § 236, citing *Greenfield's Est.*, 14 Pa. St. 489, 506; *Morgan v. Minott*,

L. R. 6 Ch. Div. 638. But in New York, and probably in most jurisdictions, the courts have not gone so far. "I find no case in this state which holds the presumption of fraud or undue influence to be so strong in law, that it cannot be overcome by evidence." *Nesbit v. Lockman*, 34 N. Y. 167, 169; *Whitehead v. Kennedy*, 69 N. Y. 462; *Barnard v. Gantz*, 140 N. Y. 249; *Herr v. Payson*, 157 Ill. 244; 1 *Perry on Trusts*, § 202.

⁴ *Hindson v. Weatherill*, 5 DeG. M. & G. 301; *Bancroft v. Otis*, 91 Ala. 279; *Matter of Will of Smith*, 95 N. Y. 516; § 386, *supra*.

⁵ *Bellew v. Russell*, 1 Ball & B. 96, 104; *Edwards v. Meyrick*, 2 Hare, 60; *Montesquieu v. Sandys*, 18 Ves. 302.

⁶ *Wood v. Downes*, 18 Ves. 120, 127; *Smith v. Brotherline*, 62 Pa. St. 461. See *Troxell v. Silverhorn*, 45 N. J. Eq. 330.

⁷ *Johnson v. Fesemeyer*, 3 DeG. & J. 13; *Smith v. Brotherline*, 62 Pa. St. 461.

may have operated to the advantage of the attorney, even though as such attorney he had no direct control of the property, the *onus* of proving the most absolute fairness and good faith is imposed upon him.¹ The same is true as to counsellors, solicitors, and legal advisers generally, while they are acting for their clients *as clients*.² And, as above shown, if being authorized to sell their clients' property, they purchase for their own benefit, in the absence of such circumstances as would enable a technical trustee to so purchase, the beneficiaries may, at their option, have the sale set aside through the medium of a constructive trust.³

§ 391. **Guardian and Ward.** — While two persons stand towards each other in the relation of guardian and ward, it is practically impossible for any contract of either gift or sale to take place between them, which may not be repudiated by the ward simply on the ground of his infancy.⁴ But, during this period, the guardian may sometimes seek to acquire the ward's property through a sale or other transfer by himself, or by some other person acting under an authority given by deed or will, or by some competent court. Such a transaction can rarely stand, if the ward proceed properly to have it set aside because of presumed fraud.⁵ It produces one of the most difficult cases of all those in which a fiduciary purchaser or donee attempts to avoid a constructive trust by proving fairness. And, when he pays very little or no consideration, he generally can not succeed.⁶ In some states the purchase by a guardian of his ward's real property is declared by statute to be absolutely void, and his act of so purchasing a misdemeanor.⁷ (a)

(a) The provision of the New York Code is: "A commissioner, or other officer making a sale, as prescribed in this title, or a guardian of an

¹ *Henry v. Raiman*, 25 Pa. St. 354; *Hockenbury v. Carlisle*, 5 Watts & S. (Pa.) 348, 350; *Beedle v. Crane*, 91 Mich. 429; *Place v. Hayward*, 117 N. Y. 487, 496.

² But when they are consulted simply as friends, or in some capacity other than that of legal advisers, the rule does not apply. *Devinney v. Norris*, 8 Watts (Pa.), 314; *Bank v. Foster*, 8 Watts (Pa.), 304; *Dobbins v. Stevens*, 17 S. & R. (Pa.) 13.

³ § 387, *supra*.

⁴ *Dawson v. Massey*, 1 Ball & B. 219, 226; *MacGreal v. Taylor*, 167 U. S.

688; *Green v. Green*, 69 N. Y. 553; *Sparman v. Keim*, 83 N. Y. 245, 250; *Bool v. Mix*, 17 Wend. (N. Y.) 119.

⁵ *O'Donoghue v. Boies*, 159 N. Y. 87; *Farmer v. Farmer*, 39 N. J. Eq. 211; 1 *Perry on Trusts*, § 200.

⁶ *Dawson v. Massey*, 1 Ball & B. 219, 226; *Farmer v. Farmer*, 39 N. J. Eq. 211. And see *Huguenin v. Basely*, 14 Ves. 273, 2 Lead. Cas. Eq. 556; *Bispham's Prin. Eq.* § 234.

⁷ N. Y. Code Civ. Pro. § 1679; *Boyer v. East*, 161 N. Y. 580; 1 *Stim. Amer. Stat. L.* § 2617.

When the guardianship has terminated, but its influence over the mind of the erstwhile ward may fairly be supposed to continue, conveyances by him to the guardian, and settlements of the estate between them are looked upon with suspicion by courts of equity; and a constructive trust arises unless the transferee proves clearly that there was no fraud, undue influence, or unfair dealing in the transaction.¹ The burden rests heavily upon the party who has recently had the power and ascendancy over the other, which is ordinarily produced by such a relationship.² Not until it is fair to assume that that influence has worn away, or it is proved as a fact that it no longer exists, can they be said to deal with each other at arms' length. The smaller the consideration and the more recent the termination of the guardianship, the heavier the burden of proof.³ And, when the transfer is *inter vivos* and purely gratuitous, immediately after the ward has become of age, the presumption of fraud is almost though not absolutely conclusive.⁴ When

infant party to the action, shall not, nor shall any person for his benefit, directly or indirectly, purchase, or be interested in the purchase of, any of the property sold; except that a guardian may, where he is lawfully authorized so to do, purchase for the benefit or in behalf of his ward. The violation of this section is a misdemeanor; and a purchase made contrary to this section is void." N. Y. Code Civ. Pro. § 1679; formerly 2 R. S. 326, § 58. This section is in the "title" of the code, which relates to actions concerning real property. It is entitled, "Purchases by certain officers prohibited. Penalty." And it is held not to apply to guardians generally, such, for example, as a guardian in socage, but only to guardians *ad litem* — those who, being appointed by the court, become its officers for the purpose of the respective actions. *Boyer v. East*, 161 N. Y. 580. When a guardian *ad litem* purchases realty affected by the action for which he was appointed, the burden is on him, in order to avoid the effect of the statute, of proving that he bought for the benefit of his ward. If he fail to prove this, his purchase is void, and the act of purchasing a misdemeanor. *O'Donoghue v. Boies*, 159 N. Y. 87, 102.

¹ *Dawson v. Massey*, 1 Ball & B. 219, 226; *Wright v. Proud*, 13 Ves. 136; *Hatch v. Hatch*, 9 Ves. 291; *Bostwick v. Atkins*, 3 N. Y. 53; *Strauss v. Bendheim*, 162 N. Y. 469; *Somes v. Skinner*, 16 Mass. 348; *Says v. Barnes*, 4 S. & R. (Pa.) 112; *Richardson v. Linney*, 7 B. Mon. (Ky.) 571; *Waller v. Armistead*, 2 Leigh (Va.), 11; *McKonkey v. Cockey*, 69 Md. 286; *Garvin v. Williams*, 50 Mo. 206.

² *Hatch v. Hatch*, 9 Ves. 292, 297;

Pierce v. Waring, 1 P. Wms. 120, n.; *Whitman's Appeal*, 28 Pa. St. 348; *O'Donoghue v. Boies*, 159 N. Y. 87.

³ "Nothing can be allowed to stand that proceeds from the pressure of the relation of guardian and ward fresh upon the mind of the ward." 1 Perry on Trusts, § 200.

⁴ *Dawson v. Massey*, 1 Ball & B. 219, 226, and other cases cited in last four preceding notes.

the gift is by will, however, the rule is the same as in the case of trustee and *cestui que trust*, i. e., while the relationship is an important item of evidence and the cause of suspicion and careful scrutiny by the court, it is not in itself sufficient to shift the burden of proof upon the donee.¹

§ 392. **Parent and Child.** — The law favors proper family settlements and arrangements.² It is assumed, too, that the influence naturally existing between parent and child will be more apt to be employed for fair and equitable results than will that between guardian and ward.³ The burden of proof, therefore, is not shifted by the mere fact that a parent buys property from his child, or receives it as a gift from him, or that it passes by either of these methods to the child from the parent. The presumption is in favor of the validity of the transfer.⁴ But the closeness of the relationship and the opportunities which it affords for unfair dealing are circumstances of suspicion, which cause the court of equity to scrutinize the transaction very carefully. And when other circumstances, though slight, indicate that fraud or undue influence may have been employed, the additional fact that this relation exists between the parties will readily turn the scales against the transaction.⁵ Thus, the fact that the parent is old and feeble and has come to rely to some extent upon the child;⁶ or, on the other side, that the child is inexperienced, and in other matters has been unfairly treated by the parent, or that the transfer is very detrimental to the child,⁷ will be enough to shift upon the donee the burden of overcoming the presumption of fraud and a constructive trust. The same rule applies between children and all those who stand *in loco parentis* to

¹ § 386, *supra*; *Bancroft v. Otis*, 91 Ala. 279; *Matter of Smith*, 95 N. Y. 516; *In re Adams' Estate*, 201 Pa. St. 502.

² *Hartopp v. Hartopp*, 21 Beav. 259; *Hoblyn v. Hoblyn*, L. R. 41 Ch. Div. 200; 1 *Perry on Trusts*, § 201.

³ *Jenkins v. Pye*, 12 Pet. (U. S.) 241, 253; *Matter of Will of Martin*, 98 N. Y. 193; *In re Budlong's Will*, 126 N. Y. 423; *Crothers v. Crothers*, 149 Pa. St. 201; *Francis v. Wilkinson*, 147 Ill. 370; *Millican v. Millican*, 24 Tex. 426.

⁴ *Towson v. Moore*, 173 U. S. 17, 24; *Jenkins v. Pye*, 12 Pet. (U. S.) 241, and other cases cited in preceding note. But some of the modern English cases favor

the shifting of the burden of proof by the mere existence of this relationship. See *Smith v. Kay*, 7 H. L. Cas. 750; *Baker v. Bradley*, 7 DeG. M. & G. 597; *Readdy v. Pendergast*, 55 L. T. Rep. 767; *Bainbrigg v. Browne*, L. R. 18 Ch. Div. 188.

⁵ *Taylor v. Taylor*, 49 U. S. 183; *Barnard v. Gantz*, 140 N. Y. 249; *Bergen v. Udall*, 31 Barb. (N. Y.) 9; *Miller v. Simonds*, 72 Mo. 669.

⁶ *Barnard v. Gantz*, 140 N. Y. 249; 1 *Perry on Trusts*, § 201.

⁷ *Taylor v. Taylor*, 49 U. S. 183; *Towson v. Moore*, 173 U. S. 17; 1 *Perry on Trusts*, § 201.

them.¹ And, in a greater or less degree, according to the nearness and intimacy of kinship, it affects all close family relationships.²

§ 393. **Other Close Relations.**—The foregoing discussion shows the general principle at the foundation of constructive trusts raised upon the presumption or apprehension of fraud growing out of the relation or connection between the parties. Trustee and *cestui que trust*, attorney and client, guardian and ward, where that relation still subsists or has but recently terminated, — these are the parties between whom such a trust will be readily interposed, simply because of the existence of the relationship.³ Like the relation of parent and child, the other close connections and associations are circumstances of suspicion and items of evidence, which call for careful scrutiny and cause courts of equity to look at the transactions “with a jealous eye;” but they do not generally, when unaided by proof of other facts of suspicion, give rise to constructive trusts. Of course, the closer such persons stand to each other, and the more intimate their association, the greater is the aid which their relationship gives to those who seek to impugn their transactions. Husband and wife, principle and agent, steward and employer, minister and parishioner, confidential medical adviser and patient, promoters and directors of corporations and the corporations and their stockholders, partners, tenants in common, intimate neighbors or friends, and many others come within the operation of this general rule.⁴

§ 394. **Promoters and Directors of Corporations** have furnished some prominent instances of the working of the principle. Thus, in *Tyrrell v. The Bank of London*,⁵ one, who was already interested with others in organizing a bank, purchased land, a part of which he subsequently sold to the new company (of which he had become a director), at a price materially larger than that paid by himself. It was held that, since his relation

¹ *Archer v. Hudson*, 7 Beav. 551; *Maitland v. Irving*, 15 Sim. 437.

² *Harvey v. Mount*, 8 Beav. 439; *Sears v. Shafer*, 6 N. Y. 268; *Smith v. Smith*, 134 N. Y. 62; *Kennedy v. Kennedy*, 2 Ala. 571; *Hewitt v. Crane*, 2 Halst. Ch. (N. J.) 159.

³ §§ 386, 390, 391, *supra*.

⁴ *Huguenin v. Baseley*, 14 Ves. 273; *Sheffield Society v. Aixlewood*, L. R. 44 Ch. Div. 412; *Ahearns v. Hogan*,

1 Drury, 310; *Richardson v. Green*, 133 U. S. 30; *Carpenter v. Carpenter*, 131 N. Y. 101; *Pierce v. Pierce*, 71 N. Y. 154; *McClellan v. Grant*, 83 N. Y. App. Div. 599; *Bud C. & I. Co. v. Humes*, 157 Pa. St. 278; *Wickersham v. Crittenden*, 93 Cal. 17; *Jacobs v. Lude-mann*, 137 Cal. 176; *McKee v. Griggs*, 51 N. J. Eq. 178; *Hill on Trustees*, 547; 1 *Perry on Trusts*, § 204.

⁵ 10 H. L. Cas. 26.

to the corporation was fiduciary at the time of his purchase, and he had concealed from it the fact of his own gain in the transaction, he held that gain as its constructive trustee.¹ This, it seems, will not be the result, in the absence of actual fraud, if the promoter purchase the land and own it *before* he becomes in any way interested in the corporation.² But even in such a case a trust will arise against him, if in selling to the company he make any false representation as to what he paid for the property.³

§ 395. **Purchases under Contract or Promise to Convey.**—

Another important group of such cases embraces those transactions in which confidential agents or other fiduciary parties acquire property, which they have orally agreed to purchase for persons already owning some interest either in the land itself or in its purchase money; and then seek to avail themselves of the statute of frauds⁴ as an excuse for not performing their agreements. Equity will not permit that statute to be thus used as an instrument of fraud.⁵ And, in favor of such an interested party, it will raise a constructive trust in the land so bought. Thus, if a person buy realty under an oral agreement to convey all or part of it to one who already has an interest therein, such as a mortgagor whose land is being sold on foreclosure, or a part owner of property sold for partition, equity will hold the purchaser a trustee for him who has such interest.⁶ So, when the contracting parties are partners, and the partnership funds are used in payment, or those funds are so employed by one partner even without the knowledge of the other, or if each of the parties contribute a definite portion of the purchase money

¹ See also *Archer's Case* (1892), 1 Ch. 322, 341; *McGourkey v. Toledo & Ohio Cent. R. Co.*, 146 U. S. 536, 565; *Brewster v. Hatch*, 122 N. Y. 349; *Ex. Mission Land & Water Co. v. Flash*, 97 Cal. 610, 634; *Russel v. Fuel Gas Co.*, 184 Pa. St. 102; *Collins v. Case*, 23 Wis. 230, 16 Amer. Law Rev. 671.

² *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218, 1236; *Ladywell Mining Co. v. Brookes*, L. R. 35 Ch. Div. 400; *Milwaukee Cold Storage Co. v. Decker*, 40 Lawy. Rep. Ann. 837; *Bispham's Prin. Eq.* § 239.

³ *Ex. Mission Land & Water Co. v. Flash*, 97 Cal. 610; *McGourkey v. T. & O. Cent. R. Co.*, 146 U. S. 536, 565.

⁴ The fourth section of the English

statute, or its equivalent here, which requires the contract or some note or memorandum thereof to be in writing, in order to establish an agreement for any interest in lands, tenements, or hereditaments. 29 Car. II. ch. 3, § 4; N. Y. L. 1896, ch. 547, § 224; *Stim. Amer. Stat. L.* § 4140.

⁵ *Maddison v. Alderson*, L. R. 8 App. Cas. 467, 474; *Bork v. Martin*, 132 N. Y. 280; *Traphagen v. Burt*, 67 N. Y. 30; *Wainwright v. Talcott*, 60 Conn. 43; *Adam's Eq.* 46.

⁶ *Ryan v. Dox*, 34 N. Y. 307; *Peck v. Peck*, 110 N. Y. 64; *Cook v. Cook*, 69 Pa. St. 443; *Kent v. Dean*, 128 Ala. 600; *Grunley v. Webb*, 44 Mo. 444; *Mackay v. Martin*, 26 Tex. 57.

or other consideration before the land is bought, a constructive trust will arise against the purchaser who seeks to hold the property as exclusively his own.¹ But beyond this equity adheres to the statute of frauds; and, where the contracting parties are strangers, will not enforce an oral agreement to convey realty to one who has no existing interest in it at the time of its purchase by the other party, and who has done no act of part performance and has parted with nothing of value pursuant to his contract with the purchaser.²

§ 396. **Gifts from Fraudulent Taker.** — It is to be added that, if one claim as a gift property coming to him through another's practices which are actually fraudulent, or for any cause are presumed to be so, he holds it constructively in trust for the rightful owner. Under such circumstances, said Chief Justice Wilmot, in *Bridgman v. Green*, "Let the hand receiving the gift be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it."³ Being once touched by the fraud, the land can not be cleansed from the defilement until the injured party has obtained his redress, or the property has come into the hands of an innocent purchaser for value without notice of the wrong.⁴

§ 397. **Remedy.** — In all these cases of constructive trusts, whether established by proof of actual fraud or raised by presumption of equity, the injured party may have a reconveyance of the property, if it be still in the hands of the trustee; or, when it has passed beyond the reach of such redress, he may have an accounting and damages against the wrong-doer.⁵

¹ *Collins v. Carsons*, 30 Atl. Rep. (N. J. Eq.) 162; *Everly v. Harrison*, 167 Pa. St. 355; *Cushing v. Danforth*, 76 Me. 114; *Bryan v. McNaughton*, 38 Kan. 98; *Van Buskirk v. Van Buskirk*, 35 Me. 383; *Aborn v. Searles*, 18 R. I. 357; *Reorganized Church v. Church of Christ*, 60 Fed. Rep. 937; *Barton v. McGrader*, 69 Miss. 462. But it is held in some states that the whole of the purchase money must be advanced before the purchase, by one who claims the benefit of such a trust. *Schierloh v. Schierloh*, 148 N. Y. 103; *Bryant v. Allen*, 54 N. Y. App. Div. 500; *Dudley v. Dudley*, 176 Mass. 34.

² *Levy v. Bush*, 45 N. Y. 589; *Emerson v. Galloupe*, 158 Mass. 146; *Fox v. Peoples*, 201 Pa. St. 9; *Nestal v. Schmidt*,

29 N. J. Eq. 458; *Taylor v. Boardman*, 24 Mich. 287; *Robbins v. Kimball*, 55 Ark. 414; *Minot v. Mitchell*, 30 Ind. 228; *Barden v. Harlley*, 112 Wis. 74; *Burden v. Sheridan*, 36 Iowa, 125; *James v. Smith* (1891), 1 Ch. 384.

³ 2 Ves. Sr. 627.

⁴ *Bassett v. Nosworthy*, 2 Lead. Cas. Eq. 1, and notes; *Anderson v. Blood*, 152 N. Y. 285; notes, §§ 297, 364, *supra*.

⁵ *Ex parte Reynolds*, 5 Ves. 707; *Fox v. Mackreth*, 1 Lead. Cas. Eq. p. *115; *Jackson v. Walsh*, 14 Johns. (N. Y.) 407, 415; *Robbins v. Bates*, 4 Cush. (Mass.) 104; *Sohler v. Sohler*, 135 Cal. 323; *Bispham's Prin. Eq.* § 239.

§ 398. (γ) **Constructive Trusts arising from Fraud presumed or declared to exist as affecting Third Parties.**—In many instances in which real property is conveyed or transferred in such a manner as to injure the rights of third persons not parties to the transactions, statutes or common-law rules or both, afford substantial remedies, without calling for any trust or any application to a court of equity. That court, however, will take cognizance of such cases and grant relief through the medium of a constructive trust, the foundation of which is fraud actual or presumed. And suits in equity, upon this theory of a trust, are now the most ordinary methods of procedure for the redress of such grievances. The important groups of fraud which give rise to them are fraud on purchasers, fraud on creditors, fraud on marital rights and fraud on powers. A few words as to each of these will be sufficient.

§ 399. **Fraud on Purchasers.**—If the owner of land make a voluntary conveyance of it to one person,—i. e., a conveyance without any valuable consideration,—and then convey it to another person for value, the first taker is readily presumed to be a fraudulent holder in trust for the second purchaser. This was the rule in equity even before the matter was affected by legislation.¹ By the statute of 27 Eliz. ch. 4, which was made perpetual by the act of 39 Eliz. ch. 18, § 31, it was enacted that any conveyance, lease, or other transfer of any lands, tenements, or hereditaments, for the purpose of defrauding and deceiving persons who shall purchase the same for valuable consideration, “shall be deemed, only against such persons, to be wholly void, frustrate, and of none effect.” This statute has been substantially re-enacted or tacitly adopted in all the states of this country.² And it affords a solid base for a constructive trust, when the defrauded purchaser for value seeks his remedy in equity.³

There is, however, a radical distinction between the English construction of this statute and its construction in America. In England the purchaser or encumbrancer for value can have the other taker declared a trustee, and his acquisition of the property nullified, even though the former when he purchased

¹ *Perry-Herrick v. Attwood*, 2 DeG. & J. 21; *Lloyds Bk. Limited v. Bullock* (1896), 2 Ch. 192, 198; *Davis v. Bigler*, 62 Pa. St. 242, 247; *Kerr on Fraud and Mistake*, 227; *May, Fr. Conv.* 3.

² 1 Stim. Amer. Stat. L. § 4592.

³ *Ellison v. Ellison*, 1 Lead. Cas. Eq. p. * 245, and notes; *Cathcart v. Robinson*, 30 U. S. (5 Pet.) 264, 279.

had notice of the voluntary conveyance.¹ The theory is that, since the voluntary transfer is made void by the statute, it may be disregarded by a subsequent purchaser for value from the same grantor.² It is essential that such subsequent purchase shall be from the same grantor. An heir or devisee can not defeat his ancestor's or testator's voluntary conveyance, by merely selling the same land for value to one who has notice.³ And when a voluntary taker has conveyed to another person for value, the latter may hold the property against a subsequent purchaser from the original grantor.⁴ In this country, a purchaser or encumbrancer for value, who has notice of a prior transfer of the land without value, takes subject to the rights of the voluntary grantee, unless the latter was privy to an intended wrong; and this is true whether the two conveyances were made by the same person or by different persons.⁵ In New York, and possibly in some other states, the statute expressly declares that this shall be the effect of such notice.⁶ (a) The fact, moreover, that most conveyances and encumbrances,

(a) This statute, first enacted in 1787, and taken from 27 Eliz. ch. 4, was contained in 2 J. & V. 88, § 3, and 2 R. S. 134, §§ 1, 2; and now, in Real Prop. L. § 226, reads as follows: "A conveyance of an estate or interest in real property, or the rents and profits thereof, and every charge thereon, made or created with intent to defraud prior or subsequent purchasers or encumbrancers, for a valuable consideration, of the same real property, rents, and profits, is void as against such purchasers and encumbrancers. Such a conveyance or charge shall not be deemed fraudulent in favor of a subsequent purchaser or encumbrancer, who, at the time of his purchase or encumbrance, has actual or legal notice thereof, unless it appears that the grantee in the conveyance, or the person to be benefited by the charge, was privy to the fraud intended." The last sentence of this statute was first added in 2 R. S. 134, § 2. See *Matter of Jacobs*, 98 N. Y. 98; *Mosley v. Mosley*, 15 N. Y. 334; *Jackson v. Garnsey*, 16 Johns. 189; *Ames v. Blunt*, 5 Paige, 13; *Jackson v. Cadwell*, 1 Cow. 622; *Youngs v. Carten*, 1 Abb. N. C. 136; *Becknell v. Lancaster Ins. Co.*, 1 T. & C. 215, 58 N. Y. 677; *Ten Eyck v. Witbeck*, 135 N. Y. 40.

¹ *Evelyn v. Templar*, 2 Bro. Ch. 148; *Doe v. James*, 16 East, 212; *Hill v. Bishop of Exeter*, 2 Taunt. 69; *Buckle v. Mitchell*, 18 Ves. 100, 111; *Gooch's Case*, 5 Rep. 60. See *Sterry v. Arden*, 1 Johns. Ch. (N. Y.) 261, 268.

² Cases cited in last preceding note; *Cathcart v. Robinson*, 30 U. S. (5 Pet.) 264, 279.

³ *Kerr on Fraud and Mistake*, 229.

⁴ *Ibid.*; *Bassett v. Nosworthy*, 2 Lead. Cas. Eq. 1, and notes.

⁵ *Cathcart v. Robinson*, 30 U. S. (5 Pet.) 264, 279; *Verplanck v. Sterry*, 12 Johns. (N. Y.) 536; *Roberts v. Anderson*, 3 Johns. Ch. (N. Y.) 371; *Lancaster v. Dolan*, 1 Rawle (Pa.), 231; *Mayor v. Williams*, 6 Md. 235, 242; *Keeling v. Hoyt*, 31 Neb. 453; 4 Kent's Com. p. *463 *et seq.*

⁶ N. Y. L. 1896, ch. 547, § 226; 1 Stim. Amer. Stat. L. § 4592.

in this country are recorded, and thereby constructive notice of them is given to subsequent purchasers and encumbrancers, makes it very rare that constructive trusts arise here because of such fraud on purchasers of real property. Still the principle is here, and has been applied in some cases in which purchasers, mortgagees, etc., for value have had no notice, by record or otherwise, of prior conveyances to voluntary grantees.¹

§ 400. **Fraud on Creditors.** — Upon the principle that a man must be just before he is generous, the owner of property is forbidden to give it away so as to impair the rights of his creditors. This has been always true, of course, as a working principle in both law and equity.² But, probably because of the frequent attempts to violate it, and the difficulties thrown in the way of its enforcement, statutes were passed in very early times, and have been re-enacted and rigidly enforced on both sides of the Atlantic, for the protection of creditors against such covinous transfers. Usually the best remedy for a creditor, in these cases, is in equity, on the theory that the holder of the legal estate is his constructive trustee.³

Beginning as early as Edward III.,⁴ these enactments culminated in England in the celebrated statute of 13 Eliz. ch. 5, which, after reciting that feoffments, gifts, grants, etc., had been contrived of malice, fraud, covin, etc., “to delay, hinder, or defraud creditors or others of their just and lawful actions, suits, debts, accounts,” etc., provides in substance that every transfer of lands, tenements, hereditaments, goods, and chattels, or any of them, for any such intent or purpose, shall be utterly void, as against the person and his heirs, successors, etc., whose actions, suits, debts, etc., are or might be thereby disturbed,

¹ Cases cited in last three preceding notes. Voluntary conveyances are good between the immediate parties. But courts will not ordinarily aid any one to enforce an executory agreement to make a voluntary settlement or transfer. *Matter of James*, 146 N. Y. 78, 93; *Wadd v. Hazleton*, 137 N. Y. 215; *Pomeroy*, Eq. Jur. § 1148; *Story*, Eq. Jur. § 987. See *Tarbox v. Grant*, 56 N. J. Eq. 199; *Landon v. Hutton*, 50 N. J. Eq. 500; *Lawrence v. Lawrence*, 181 Ill. 248; 1 *Perry on Trusts*, § 109.

² Notes to *Twyne's Case*, 1 *Smith's L. C.* 1, 33; *Clements v. Moore*, 73 U. S. 299; *Cadogan v. Kennett*, 2 *Cowp.* 432. See *Davis v. Schwartz*, 155 U. S. 631,

639; *Dearing v. McKinnon, etc. Co.*, 165 N. Y. 78, 90.

³ *Twyne's Case*, 1 *Smith's L. C.* 1, 33, 49; *Blenkinsopp v. Blenkinsopp*, 1 *DeG. M. & G.* 495, 500; *Hendricks v. Robinson*, 2 *Johns. Ch. (N. Y.)* 283; *Weed v. Pierce*, 9 *Cow. (N. Y.)* 722; *Cook v. Johnson*, 12 *N. J. Eq.* 51; *Athey v. Knotts*, 6 *B. Mon. (Ky.)* 24; *People's Bk. v. Loeffert*, 184 *Pa. St.* 164, 172; *Botsford v. Beers*, 11 *Conn.* 370.

⁴ *Stat.* 50 *Edw. III. v. 6*; *Stat.* 3 *Hen. VII. ch. 4*; *Stat.* 2 *Rich. II. ch. 3*; notes to *Twyne's Case*, 1 *Smith's L. C.* 1, 33.

hindered, delayed, or defrauded. Such is now, also, the statutory law in most, if not all, of the United States.¹ (a)

The conveyances, which are thus rendered voidable, are those which are made with *fraudulent intent*.² If the motive which actuated both parties to the transaction can be shown to have been to hinder, delay, or otherwise injure creditors of the grantor, those creditors may treat the grantee as their constructive trustee, and have the deed to him set aside, even though he paid value, either in part or in full, for the property.³ The cases, however, in which such relief is most readily obtainable, are those in which the conveyances are voluntary, or for small or inadequate consideration. Hence these proceedings

(a). The New York statute, which was 2 R. S. 137, § 1, taken from Jones and Varrick's revision of 1786-87 (2 J. & V. 88), in its turn taken from 13 Eliz. ch. 5, is now Real Prop. L. § 227, which provides that "A conveyance or assignment in writing or otherwise, of an estate, interest, or existing trust in real property, or the rents or profits issuing therefrom, or a charge on real property, or on the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts, or demands, or a bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like intent, is void as against every person so hindered, delayed, or defrauded." See also §§ 228-232; L. 1897, ch. 417, §§ 7, 24-29; L. 1902, ch. 528; *Dearing v. McKinnon, etc. Co.*, 165 N. Y. 78; *Manning v. Beck*, 155 N. Y. 577; *Bristol v. Hull*, 166 N. Y. 59; *First Nat. Bk. v. Miller*, 163 N. Y. 164; *Beuerlien v. O'Leary*, 149 N. Y. 33; *Murphy v. Briggs*, 89 N. Y. 446; *Commercial Bk. v. Sherwood*, 162 N. Y. 310; *Billings v. Russell*, 101 N. Y. 226; *Neuberger v. Keim*, 134 N. Y. 35; *Jacobs v. Morrison*, 136 N. Y. 101; *Seymour v. Wilson*, 19 N. Y. 417; *Galle v. Tode*, 148 N. Y. 270; *Metcalf v. Moses*, 161 N. Y. 587; *Albany Co. Sav. Bk. v. McCarthy*, 149 N. Y. 71; *Matteson v. Palser*, 173 N. Y. 404; *Jenkins v. Good C. & M. Co.*, 56 App. Div. 573, *aff'd* 168 N. Y. 679; *Masch v. Grauer*, 58 App. Div. 560; *N. Y. Co. Nat. Bk. v. Amer. Surety Co.*, 69 App. Div. 153.

¹ N. Y. L. 1896, ch. 547, § 227, see also §§ 228-232; 1 Stim. Amer. Stat. L. §§ 4591, 4593; 2 Kent's Com. p. *440; National Bankruptcy Act of 1898, ch. 111, §§ 3, 60, 67.

² *Zoeller v. Riley*, 100 N. Y. 102; *Metcalf v. Moses*, 161 N. Y. 587; *Werner v. Zierfuss*, 162 Pa. St. 360; *Fidler v. John*, 178 Pa. St. 112; *Stewart v. Exch. Bank*, 55 N. J. Eq. 795; *Bouquet v. Heyman*, 50 N. J. Eq. 114; *Bump, Fraud. Conv.* § 594.

³ *Twyne's Case*, 1 Smith's L. C. 1, 33; *Holmes v. Penney*, 3 Kay & J. 90,

99; *Zerbe v. Miller*, 16 Pa. St. 488, 497; *Gable v. Columbus Cigar Co.*, 140 Ind. 563; *Beasley v. Bray*, 98 N. C. 266; *Beidler v. Crane*, 135 Ill. 92, 96. The fraudulent purpose of the debtor is properly imputed to the creditor, if he passively accepted the advantage of the debtor's wrong-doing, as by letting him fraudulently confess judgment, etc. *Metcalf v. Moses*, 161 N. Y. 587; *Greenwald v. Wales*, 174 N. Y. 140. See *Carr v. Briggs*, 156 Mass. 78; *Bump, Fraud. Conv.* 197; *Kerr on Fraud and Mistake*, 200.

are frequently spoken of as made to set aside "voluntary conveyances in defraud of creditors."¹ In the last analysis, every transfer of property for less than its value is voluntary in character; there is a gift of so much as it is worth over and above the consideration. The greater this difference between the price paid and the value, the more readily may the vendor's creditors set aside the conveyance. But even the fact that the transfer is wholly a gift is not, of itself, sufficient to prove fraud.² The question is one of fact, to be determined from evidence of the circumstances of each case.³ A man may, for example, make a valid gift to his wife, or to a relative or friend, if he do not thereby materially impair his means of paying all his debts.⁴ But if such disposal of his property leave him insolvent, it is difficult and usually impossible for him to prove against his creditors that it was not fraudulent.⁵ The *criterion* appears to be whether or not the "donor has, at the time, the pecuniary ability to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their prospects for payment."⁶ A *bona fide* alienation for value, on the other hand, may be sustained, even when made by an insolvent grantor,⁷ and the value may be a past consideration.⁸ Thus, in the ab-

¹ Authorities cited in last three preceding notes.

² *Townsend v. Westcott*, 2 Beav. 340; *Sexton v. Wheaton*, 21 U. S. (8 Wheat.) 229; *Nattingly v. Nye*, 75 U. S. 370; *First Nat. Bk. v. Miller*, 163 N. Y. 164, 167. In order to render a voluntary conveyance void as to subsequent creditors, there must be affirmative evidence that it was made to defraud them. *Nattingly v. Nye*, 75 U. S. 370; *Buckley v. Duff*, 114 Pa. St. 596; *Todd v. Nelson*, 109 N. Y. 316; *Bouquet v. Heyman*, 50 N. J. Eq. 114.

³ *First Nat. Bk. v. Miller*, 163 N. Y. 164, 167; *Bristol v. Hull*, 166 N. Y. 59, 66; *Batavia v. Wallace*, 102 Fed. Rep. 243; *Jones v. Simpson*, 116 U. S. 609; N. Y. L. 1896, ch. 457, § 229; *Twyne's Case*, 1 Smith's L. C. 33, 37, 40.

⁴ *Hopkins v. Randolph*, 2 Brock. (U. S. Cir. Ct.) 132; *Casey v. Davis*, 100 Mass. 124, 130; *Dawson v. Waltemeyer*, 91 Md. 328; 2 *Bigelow on Fraud*, 393.

⁵ *Metcalf v. Moses*, 161 N. Y. 587; 2 *Kent's Com.* 441.

⁶ *Jenkyn v. Vaughan*, 3 Drew. 419, 425; *Thompson v. Webster*, 4 Drew. 628; *Kent v. Riley*, 14 Eq. 190; *Bump, Fraud. Conv.* 291.

⁷ *Clements v. Moore*, 73 U. S. 299, 312; *Galle v. Tode*, 148 N. Y. 270; *Hancock v. Elmer*, 61 N. J. Eq. 558; *De Hierapolis v. Reilly*, 44 N. Y. App. Div. 22; *Skirm v. Rubber Co.*, 57 N. J. Eq. 179; *Beasley v. Bray*, 98 N. C. 266; *Van Baalte v. Harrington*, 101 Mo. 602.

⁸ *Commercial Bk. v. Sherwood*, 162 N. Y. 310; *Huntley v. Kingman*, 152 U. S. 527, 532; *Dodge v. McKeelinie*, 156 N. Y. 514, 520; *Rep. Chemical Co. v. Victor Co.*, 101 Fed. Rep. 948. But see *Nat. Bankruptcy Act*, 1898, ch. 111 a, 2; *West Co. v. Lea*, 174 U. S. 590; *Goldman v. Smith*, 93 Fed. Rep. 182; *Nat. Bk. & Loan Co. v. Spencer*, 53 N. Y. App. Div. 547; *Snell's Eq.* 68.

sence of positive statutory restrictions such as insolvent or bankrupt laws, a debtor, acting in good faith, may exhaust his assets in paying only one or a few of his many creditors; or he may use them in paying a just claim that has become barred by the statute of limitations.¹ It suffices, if he satisfy a present moral obligation, which is founded upon an antecedent legal obligation.³ So, he may validly convey his property for money, or money's worth, or a marriage contracted as a *quid pro quo* for the transfer, — these being the three forms of valuable considerations. When such a consideration is proved, and no fraudulent intent is established, the transaction is sustained.²

The immediate parties to transactions which are fraudulent against creditors can not have them set aside, nor have any trusts founded upon them, because they can not take advantage of their own wrong.³ But the statutes give the remedy to creditors and *others* who may be injured by the transaction. All persons are thus included who have claims against the donor or grantor which ought to be satisfied out of his property.⁴ Such, for examples, are a person entitled to a penalty against him under the usury law,⁵ a party with a claim in tort against him for injury to person or property,⁶ and his wife suing for divorce and alimony.⁷ Not only those who are creditors of the grantor or donor at the time of the fraudulent conveyance, but, by the weight of authority, also, those subsequent creditors, whose rights are impaired by the transfer, may have the transaction declared fraudulent and set aside in their favor. Such are those cases in which one about to enter upon a hazardous financial enterprise, or to go into uncertain or reckless speculation, disposes of his property by voluntary settlement, and then by such business or speculative operations incurs debts which his remaining assets will not discharge.⁸

¹ Bump, Fraud. Conv. 249, 250.

² *Clemens v. Moore*, 73 U. S. 299, 312; *Galle v. Tode*, 148 N. Y. 270; *Delaney v. Valentine*, 154 N. Y. 692, 704; *Hiller v. Jones*, 66 Miss. 636; *Sterry v. Arden*, 1 Johns. Ch. (N. Y.) 261; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481, 489; *Bank v. Read*, 131 Mo. 553; *Snell's Eq.* 68.

³ *Blystone v. Blystone*, 51 Pa. St. 373; *Bonsteel v. Sullivan*, 104 Pa. St. 9; *Barwick v. Moyse*, 74 Miss. 415; *Harvey v. Varney*, 98 Mass. 118; *Wiltzie on Mortgage Foreclosure*, § 356.

⁴ *Twyne's Case*, 1 Smith's L. C. 1, 33, and notes.

⁵ *Heath v. Page*, 63 Pa. St. 108.

⁶ *Jackson d. Van Buren v. Myers*, 18 Johns. (N. Y.) 425; *Bigelow v. Cassidy*, 26 N. J. Eq. 557; *Thorg v. Leibrecht*, 56 N. J. Eq. 499; *Wait*, Fraud. Conv. § 90. And see *Craft v. Schlag*, 61 N. J. Eq. 567; *Jackson v. Seward*, 5 Cow. (N. Y.) 67.

⁷ *Byrnes v. Volz*, 53 Minn. 110; *Houseman v. Grossman*, 177 Pa. St. 453.

⁸ *Neuberger v. Keim*, 134 N. Y. 35; *Guy v. Craighead*, 46 N. Y. App. Div.

It is required in England, and in most of the states of this country, that, before a proceeding in equity can be sustained to overthrow a conveyance as a fraud on creditors, the claimant must have obtained a judgment at law for his demand, and had execution on the same returned wholly or partly unsatisfied.¹

§ 401. **Fraud on Marital Rights.**—If a man or woman about to marry make a voluntary conveyance of property in such manner as unfairly to deprive the intended wife or husband of a legal interest, which otherwise would have come into existence by the marriage, this constitutes a fraud, on the ground of which equity will declare a constructive trust against the alienee and in favor of the injured spouse.² Modern legislation, giving to married women large control over their property, has made cases of this kind less frequent than they formerly were. For many of them were brought against wives, who on the eve of marriage secretly disposed of lands in defraud of the intended husbands;³ and there is no fraud in their aliening property before marriage, which they can readily dispose of during coverture so as to exclude all marital rights in the same.⁴ But wherever the law is still such that marriage gives to husband or wife a right or interest in the other's property which that other alone can not take away, as is still true of the wife's dower right in New York, New Jersey, and most of the older states, a secret voluntary disposition of such property just before the marriage will readily cause a constructive trust.⁵ A transfer will be good and unassailable, however, if

614; *Marshall v. Roll*, 139 Pa. St. 399; *Jones v. Light*, 86 Me. 437; *Kinsey v. Feller*, 51 Atl. Rep. (N. J.) 485; *Bispham's Prin. Eq.* § 245. And any transfer, once shown to be fraudulent, may be attacked by subsequent creditors, as well as by those who were creditors at the time. *Marshall v. Roll*, 139 Pa. St. 399; *Jones v. Light*, 86 Me. 437.

¹ *Southard v. Benner*, 72 N. Y. 424; *Fruit Co. v. Buck*, 52 N. J. Eq. 219, 229; *Wait, Fraud. Conv.* §§ 73-88. See *Neresheimer v. Smith*, 167 N. Y. 202. While, in England, only lien creditors can attack fraudulent donations after the donor's death; in this country all kinds of creditors have, after his death, practically the same rights that belonged to them while he was living. *Story, Eq. Jur.* §§ 375, 376; N. Y. L. 1889, ch. 487.

² *Strathmore v. Bowes*, 1 Lead. Cas.

Eq. 405; *Hunt v. Matthews*, 1 Vern. 408; *England v. Downs*, 2 Beav. 522; *Cheshire v. Payne*, 16 B. Mon. (Ky.) 618; *Hinkle v. Landis*, 131 Pa. St. 573; *Tyler v. Tyler*, 126 Ill. 525; *Alkire v. Alkire*, 134 Ind. 350; *Nichols v. Nichols*, 61 Vt. 426; *Beers v. Beers*, 79 Iowa, 555; 1 *Perry on Trusts*, § 213.

³ *Strathmore v. Bowes*, 1 Lead. Cas. *Eq.* 405; *England v. Downs*, 2 Beav. 522, 528; *Chambers v. Crabbe*, 34 Beav. 457; *Williams v. Carle*, 10 N. J. Eq. 543; *Tucker v. Andrews*, 13 Me. 124; *Kline v. Kline*, 57 Pa. St. 120; *Ferebee v. Pritchard*, 112 N. C. 83; *Murray v. Murray*, 90 Ky. 1; *Bispham's Prin. Eq.* § 253.

⁴ *Wrigley v. Swainson*, 3 DeG. & Sm. 458; *Cole v. O'Neil*, 3 Md. Ch. 174.

⁵ Authorities cited in last three preceding notes.

made for a valuable consideration,¹ or with the acquiescence or knowledge of the other party, no matter how short a time before the marriage such knowledge may have been acquired;² and the party who alleges that it is fraudulent must prove either an actual wrongful intent against him or her, or that the transaction was of such a character that fraud must reasonably be presumed.³ The fact that the intended spouse did not know of the existence of the property fraudulently disposed of before the marriage will not change the result, if it can be shown that the gift was made for the purpose of preventing any marital right from attaching to the land.⁴

On the same principle, if a husband, pending a divorce suit brought by his wife, dispose of property in order to avoid payment of alimony, a trust will attach to it for such claim as the court may award to her against the husband.⁵ So, all ante-nuptial settlements are closely scrutinized by the courts; and when they are greatly disproportionate, or are not proved to be just and equitable, a constructive trust is readily declared in favor of the injured party.⁶

§ 402. **Fraud on Powers.** — A power affecting real property is the right to dispose of a *use* therein, or in many states, by virtue of modern statutes, to dispose of the legal estate.⁷ (a)

(a) "In New York, a power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein,

¹ *Blanchet v. Foster*, 2 Ves. Sr. 264. See *Atty.-Gen. v. Jacobs-Smith* (1895), 2 Q. B. 341; *Newstead v. Searles*, L. R. 9 App. Cas. 320, n.; *Green v. Goodall*, 1 Cold. (Tenn.) 404. A conveyance made before the treaty of marriage is commenced is not fraudulent. *Bliss v. West*, 58 Hun (N. Y.), 71.

² *St. George v. Wake*, 1 Myl. & K. 610; *Fletcher v. Ashley*, 6 Gratt. (Va.) 332; *Cheshire v. Payne*, 16 B. Mon. (Ky.) 618. And the same is true though the husband, who thus acquires notice, is an infant at the time. *Slocombe v. Glubb*, 2 Bro. C. C. 545.

³ *England v. Downs*, 2 Beav. 522; *St. George v. Wake*, 1 Myl. & K. 610; *Bliss v. West*, 58 Hun (N. Y.), 71.

⁴ *Goddard v. Snow*, 1 Russ. 485; *Logan v. Simmons*, 3 Ired. Eq. (N. C.) 487. See *Downes v. Jennings*, 32 Beav.

290; *St. George v. Wake*, 1 Myl. & K. 622; 1 *Perry on Trusts*, § 213.

⁵ *Blenkinsopp v. Blenkinsopp*, 1 De G. M. & G. 495; *Krupp v. Scholl*, 10 Pa. St. 193; 1 *Perry on Trusts*, § 213.

⁶ *Graham v. Graham*, 143 N. Y. 573; *Lovesey v. Smith*, L. R. 15 Ch. Div. 655. And see *Clark v. McMahon*, 170 Mass. 91; *Hussey v. Castle*, 41 Cal. 239; *Nance v. Nance*, 84 Ala. 375; *Kinne v. Webb*, 54 Fed. Rep. 34; *Synge v. Synge* (1894), 1 Q. B. 466.

⁷ A power, says Chancellor Kent, "is the mere right to limit a use; and the appointment in pursuance of it is the event on which the use is to arise." 4 *Kent's Com.* p. *316. Employing the same form of expression, a power, as created by many modern statutes, may be defined as the right to limit (dispose of) a legal estate. See 1 *Stim. Amer. Stat. L.* §§ 1650, 1651.

Thus, land may be granted or devised to A for such uses as B shall appoint; or, now by statute, B may be given the power of disposing of a *legal estate*, which is allowed in the mean time to descend to heirs, or is given temporarily to A, it being intended that the execution of the power shall take the property from the heirs or from A and pass it on to other persons. The subject of powers is discussed at length hereafter.¹ It is sufficient for explanation here to add that he who confers a power is called the donor, the one to whom it is given the donee, and the act of executing it an appointment.² Under the common-law system, when an appointment is made, by giving the use to some one, the Statute of Uses then transfers to the appointee the legal estate, "in the same quality, manner, form, and condition" in which he is given the use.³

A fraud on a power is its improper execution, or other unfair dealing concerning it, so as to injure those who should justly be the beneficiaries of the appointment.⁴ Thus, if land were devised to A for life, with power in B to dispose of the residue of the use (or the legal estate) among A's three children, and B should appoint all or the greater part of it to one of the three, who paid him a bribe for so doing, or should give it to one whom he could unduly influence to convey it to himself, this would be a fraud on the power, which would enable the other two children of A to have a constructive trust fastened upon the property in the hands of the appointee.⁵ This they might do also, if the donee in any way dishonestly executed the power, though the appointee had no knowledge of the fraud, and even though the donor of the power consented to the improper appointment.⁶ The creation of the power con-

which the owner, granting or reserving the power, might himself lawfully perform." New York Real Property Law (L. 1896, ch. 547), § 111, which in substance was formerly 1 R. S. 732, § 74.

¹ See also explanation of powers in trust, § 332, *supra*.

² In some states, he who confers the power, whether by deed or will, is called the "grantor," and he to whom it is given, the "grantee." See N. Y. L. 1896, ch. 547, § 112; Fowler's N. Y. Real Prop. Law, p. 321.

³ § 302, *supra*.

⁴ Lane v. Page, Ambler, 233; Aleyn v. Belchier, 1 Lead. Cas. Eq. 377; Marsden's Trust, 4 Drew. 594, 601.

⁵ Duke of Portland v. Topham, 11 H. L. Cas. 32; Wellesley v. Mornington, 2 Kay & J. 143; Marsden's Trust, 4 Drew. 594, 601; *In re Kirwan's Trust*, L. R. 25 Ch. Div. 373.

⁶ Marsden's Trust, 4 Drew. 594, 601; Lee v. Fernie, 1 Beav. 483; Duke of Portland v. Topham, 11 H. L. Cas. 32; *In re Perkins* (1893), 1 Ch. 283. See Smith v. Somes (1896), 1 Ch. 250.

fers rights upon those who should properly be the recipients of benefit from its execution ; and it is a fraud on the power to so deal with it as to impair those rights.¹

Constructive trusts and other *media* of redress arising from fraud on powers have been much more numerous in England than in this country, owing to the frequent employment of powers there in arranging marriage settlements. But the equitable principles governing the matter are the same in both countries.² "A person having a power must exercise it *bona fide* for the end designed."³ And if he so deal with it for his own benefit, or even for the benefit of a stranger, as to work injustice towards the legitimate beneficiaries, a constructive trust will readily fasten upon the property.⁴

γ. Constructive Trusts that Arise in the Absence of Fraud.

§ 403. **Foundation and Forms of such Trusts.** — On the broad foundation of the maxim, "Equity looks upon that as done which ought to be done,"⁵ constructive trusts emerge, without the existence or presumption or even the apprehension of fraud, whenever they are requisite to the working out of the best measures of justice between the parties. For it is upon the basal theory of the existence of a trust that the most ancient equitable remedies, as well as those that are the farthest reaching and most beneficent, such as specific performance of contracts, injunction, and accounting, have been originated and enforced.⁶ And, for the purpose of the remedy, the operation of the maxim frequently calls into being trusts which were not within the contemplation of the parties, and in connection with which there is not even the shadow of fraud.⁷ It would be futile to attempt to enumerate all of such cases. Probably some of them have not yet been brought before any

¹ Duke of Portland v. Topham, 11 H. L. Cas. 32; Lee v. Fernie, 1 Beav. 483.

² See Williams's Appeal, 73 Pa. St. 249; Rowley v. Rowley, Kay, 242; Turner's Estate, L. R. 28 Ch. Div. 205; 1 Perry on Trusts, §§ 211, 212, 254; Bispham's Prin. Eq. § 257.

³ Aleyn v. Belchier, 1 Lead. Cas. Eq. 377.

⁴ Marsden's Trust, 4 Drew. 594, 601; 1 Perry on Trusts, § 211.

⁵ Bispham's Prin. Eq. § 44; Fonbl. Eq. Tr. B. 1, ch. 6, § 8.

⁶ Green v. Smith, 1 Atk. 572; Williams v. Haddock, 145 N. Y. 144, 150; 1 Spence, Eq. 108, 645; Bispham's Prin. Eq. § 479.

⁷ Authorities cited in last preceding note. Also Tenseick v. Flagg, 29 N. J. L. 25; Quigley v. Gridley, 132 Mass. 35, 39; 1 Perry on Trusts, § 231.

court. The principle, which deals with them as they arise, is that a trust will exist when it ought to do so in order to produce substantial justice. The discussion of a few of the most important instances of its application will suffice. Such are the constructive trusts which accompany contracts for the purchase and sale of real property; those which attach to land in the hands of one who has taken the legal estate from a wrongdoer without paying value and without notice of the fraud; and those which exist in the form of vendors' or vendees' liens, equitable liens for money loaned upon the faith of real estate security, and the like, and which are also treated hereafter as forms of equitable mortgages.

§ 404. **Contracts for the Purchase and Sale of Real Property.** — "The general rule in regard to contracts for the sale of land is that the owner of the real estate from the time of the execution of a valid contract for such sale is to be treated as the owner of the purchase money, and the purchaser of the land is treated as the equitable owner thereof."¹ After such a contract is made, a short time usually elapses before the deed is delivered and the legal estate is passed to the vendee. In the mean time the title to the realty is examined by or for the purchaser. During this period, the intended vendor holds the land in trust for the intended vendee; and the latter is constantly said by the best courts, as is virtually done in the above quotation, to hold the purchase money in trust for the former.² It is necessary to the existence of a trust, however, that there be a definite and ascertainable fund or property as the subject-matter.³ The land contracted to be sold is always such; but how, it has been pertinently asked, can the proposed vendee hold the purchase money in trust in cases such as frequently arise in which he has no purchase money at the time, or at least none distinctively set aside as the fund with which he is to perform his part of the contract? The answer is that, when courts use expressions like that above quoted, they do so with primary reference to the *remedy*, for which constructive trusts are implied, — the land is literally held in trust for the contracting purchaser; and he is to be treated, so far as the

¹ Williams v. Haddock, 145 N. Y. 144, 150.

² Green v. Smith, 1 Atk. 572; Dexter v. Stewart, 7 Johns. Ch. (N. Y.) 52; Matter of Davis, 43 N. Y. App. Div. 331; Roberts v. Nor. Pac. R. Co., 158

U. S. 1, 10; Union Pac. R. Co. v. Chicago, etc. R. Co., 163 U. S. 564, 600; 1 Perry on Trusts, § 231.

³ 1 Perry on Trusts, §§ 67-72; §§ 300, 327, *supra*.

remedy against him is concerned, as if he actually had a fund of money distinctively set aside in trust and devoted to the purpose of buying the land. Therefore, the remedy of each against the other, in case of failure duly to perform the contract, is a specific performance suit—that ancient equitable redress (which is essentially an injunction to prevent the threatened violation of a trustee's duty¹), whereby the delinquent vendor is compellable to convey the land and pay any proximate damages caused by his default, or the vendee is required to take title to the realty and to pay to the vendor the purchase price and any proximate damages occasioned by his attempted breach of the contract.²

The trust in real property, growing out of the contract for its purchase and sale, continues to exist until either the contract is executed by the delivery and acceptance of the deed, or is mutually abandoned by the parties, or the realty passes from the intended vendor to one who purchases it in good faith, for a valuable consideration and without notice of the trust.³ Upon the death of the contracting vendor, the legal estate passes to his heirs or voluntary devisees burdened with the trust. And if, pending the contract, he wrongfully convey it to a third party, who has notice of the rights of the intended vendee, the purchaser holds it in trust for the latter.⁴ Thus, if A

¹ Willard's Eq. Jur. p. * 261.

² *Green v. Smith*, 1 Atk. 572; *Union Pac. R. Co. v. Chicago*, etc. R. Co., 163 U. S. 564, 600; *Williams v. Haddock*, 145 N. Y. 144; *O'Connor v. Felix*, 147 N. Y. 614; *Higgins v. Eagleton*, 155 N. Y. 466; *Reed v. Lukens*, 44 Pa. St. 200; *Fry on Specific Performance*, § 1. While the theory of this remedy is the existence of a trust which should be enforced, the primary reason for its adoption by equity was because of the inadequacy of the redress at law in such cases; that redress being ordinarily only damages for breach of contract. Specific performance "prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for their breach." *Union Pac. R. Co. v. Chicago*, etc. R. Co., 163 U. S. 564, 600. It might be argued that, technically, as soon as any contract to sell and purchase real prop-

erty raises a use or trust in favor of the proposed vendee, it should be executed by the Statute of Uses and no subsequent deed should be necessary. But, aside from the effect of the opposite intention of the parties so clearly shown by the contract itself by its fixing the time for the delivery of the deed, that statute does not affect the *implied* trust. The legal estate remains in the proposed vendor until the conveyance is made by the parties.

³ *Wythes v. Lee*, 3 Drew. 396; *Dinn v. Grant*, 5 DeG. & Sm. 451; *Ten Eick v. Simpson*, 1 Sand. Ch. (N. Y.) 244. And see, as to rights of innocent purchasers for value without notice, §§ 406-409, *infra*.

⁴ *Barker v. Hill*, 2 Ch. Rep. 113; *Orlebar v. Fletcher*, 1 P. Wms. 737; *Moore v. Crawford*, 130 U. S. 122, 133; *Roberts v. Nor. Pac. R. Co.*, 158 U. S. 1; *Matter of Davis*, 43 N. Y. App. Div. 331; *Borie v. Satterthwaite*, 180 Pa.

contract to sell land to B, and then let it descend to his heirs, or devise it to C, or convey it to D who has notice of B's rights, he or they who thus acquire the legal estate will hold it in trust for B, or for any one who claims under or through him as *cestui que trust*.¹

§ 405. **Legal Estate taken without Value and without Notice.** — A *bona-fide* purchaser for value, without notice of the wrong on the part of the vendor, may acquire title to property unaffected by any trust. The absence of valuable consideration is looked upon by equity, however, as equivalent to notice. And, therefore, however innocent of fraudulent intent or actual knowledge of any wrong may be a mere donee, or voluntary taker, of property, he takes it subject to any outstanding trust or equity by which it may be affected.² He may clear himself from all possible imputation of fraud; yet he holds the land as a constructive trustee for those to whom it rightfully belongs. It is proper at this place to notice, more fully than has yet been done in this treatise, the facts which must co-exist in order that a grantee may avoid this difficulty — that he may be an innocent purchaser for value without notice.

§ 406. **Bona-fide Purchase for Value without Notice.** — Three things must concur to make one an innocent purchaser for value without notice of any outstanding trust or equity which may attach to the property.³ *First*. He must buy without notice of the fraud, trust, or equity. *Second*. He must purchase for a valuable consideration. *Third*. In most states he must pay *all* of the consideration, and acquire the legal estate before receiving *any* notice of the fraud, trust, or equity. The last of these requisites is chiefly explanatory of the other two, but it conduces to clearness to discuss it separately.

§ 407. **First. Notice** is "legal cognizance of a fact." Positive knowledge is, of course, such cognizance; and this constitutes *actual notice*.⁴ A purchaser may be bound by such notice as this, either if he personally have the knowledge, or if

St. 542; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Gloucester G. & Q. Co. v. Russia Co.*, 154 Mass. 92; *Fry on Specific Performance*, § 135; 1 *Perry on Trusts*, § 231; *Bispham's Prin. Eq.* § 365.

¹ *Ibid*.

² *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 35, note; *Pye v. George*, 1 P.

Wms 128; *Ten Eyck v. Witbeck*, 135 N. Y. 40; 1 *Perry on Trusts*, § 241.

³ *Bispham's Prin. Eq.* § 263.

⁴ *Harper v. Ely*, 56 Ill. 179, 194; *Mayor v. Williams*, 6 Md. 235; *Jones v. Van Dosen*, 130 U. S. 684, 691; *Notes to Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 35.

it can be proved to have been at the time in the mind of his attorney or other agent who was properly acting for him in carrying through the purchase.¹ And it is now agreed, by practically all the courts, that notice to such agent or attorney binds the principal, if it were acquired in the very transaction of buying the land, or in some other transaction sufficiently recent and important so that it is reasonable to assume that it was present in the agent's mind at the time of the purchase.² But knowledge so brought home to the agent is not notice to his principal, if it were such that the agent had no legal right to reveal it to the principal, or if the former were engaged in connection with the purchase in a scheme to cheat or defraud the latter.³

Again, the information which is open to a purchaser by virtue of the proper record of a deed of the land, or a mortgage or other encumbrance thereon (the record being pursuant to the statute which authorizes or requires the same), or by the proper filing and indexing of a statutory lien or notice, such as a mechanic's lien or notice of the pendency of an action affecting the title to or possession of the land, is also such cognizance, whether or not the purchaser actually know of the existence of the record or of the filing; and this is *constructive notice*.⁴ Such notice is now generally the result of positive statutes.⁵ But equity has always recognized the principle that, except as modified by statute, the mere pendency of an action or suit affecting realty is notice to purchasers and

¹ *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 35; *Astor v. Wells*, 17 U. S. (4 Wheat.) 466; *Denton v. Ontario Co. Nat. Bk.*, 150 N. Y. 126; *Hovey v. Blanchard*, 13 N. H. 145.

² *Dresser v. Norwood*, 17 C. B. (N. S.) 466; *Blackburn v. Vigors*, L. R. 12 App. Cas. 531; *The Distilled Spirits*, 78 U. S. (11 Wall.) 356, 366; *McIntire v. Pryor*, 173 U. S. 38, 52; *Constant v. Univ. of Rochester*, 111 N. Y. 604; *Slattery v. Schwannecke*, 118 N. Y. 543; *McCutchen v. Dittman*, 164 N. Y. 355; *Willard v. Denise*, 50 N. J. Eq. 482; *Hart v. Farmer's Bk.*, 33 Vt. 252; *Sheridan v. Briggs*, 53 Mich. 569, 572.

³ *Kettlewell v. Watson*, L. R. 21 Ch. Div. 685, 707; *Henry v. Allen*, 151 N. Y. 1; *Benedict v. Arnoux*, 154 N. Y. 715, 728; *Amer. Surety Co. v. Pauly*

(No. 1), 170 U. S. 133, 156; *Indian Head Bank v. Clark*, 166 Mass. 27; *Cole v. Getzinger*, 96 Wis. 559; *Gunster v. Scranton I. H. & P. Co.*, 181 Pa. St. 327; *United States Security Co. v. Cent. Nat. Bk.*, 185 Pa. St. 586, 600.

⁴ *Carpenter v. Dexter*, 75 U. S. (8 Wall.) 513, 532; *Bispham's Prin. Eq.* § 270.

⁵ *New York L.* 1896, ch. 547, §§ 240-247; *N. Y. Code Civ. Pro.* §§ 1670-1673; *Fowler's Real Prop. L. of N. Y.* pp. 544-562; *Gen. Stat. N. J.* pp. 855, 856, 882; 1 *Stim. Amer. Stat. L.* §§ 1610-1632. It has been held that such record once properly made is constructive notice, though the records have been destroyed. *Tucker v. Shaw*, 158 Ill. 326.

encumbrancers thereof of all the rights that the parties to the litigation may thereby establish.¹ And the equitable doctrine of constructive notice, independent of legislation, is still more forcibly illustrated by the rule, well settled in many states, that actual and open possession of real property under an unrecorded deed or encumbrance is constructive notice of all the interest and rights which the person in possession is able to establish under such deed or encumbrance.² If, therefore, A, relying wholly on what appears upon the official records, buy land of which B is at the time holding actual, open, and visible possession under an unrecorded conveyance or mortgage, he is bound by notice of all B's rights in the property.³

Lastly, as to kinds of notice, when the purchaser or his agent acquires knowledge of facts, which should lead him as a reasonable person to suspect the existence of the outstanding trust or equity, and to make inquiry concerning it, and it can be proved that if he properly made the inquiry or investigation he would thereby obtain knowledge of the facts concerning such trust or equity, then he has notice of it whether he make such investigation or not; and this is *presumptive* or *implied notice*,⁴ which

¹ Sorrell v. Carpenter, 2 P. Wms. 482; Murray v. Ballou, 1 Johns. Ch. (N. Y.) 566; Cook v. Mancius, 5 Johns. Ch. (N. Y.) 89; Enfield v. Jordan, 119 U. S. 680, 693; Turner v. Haupt, 53 N. J. Eq. 526; Snively v. Hitechew, 59 Pa. St. 49; Adams's Doct. Eq. 157. He who purchases property affected by such litigation buys with notice of all the rights established by the litigation, whether or not any formal notice of its existence is filed. But the statutes of most states abolish this general doctrine of *lis pendens*, and require as notice of an action a formal written document, made as prescribed by the statute, and duly filed and indexed. See statutes cited in last preceding note.

² Phelan v. Brady, 119 N. Y. 587; Smith v. Reid, 134 N. Y. 568; Marden v. Dorthy, 160 N. Y. 39, 52; Kirby v. Talmadge, 160 U. S. 379; Essex Co. Bank v. Harrison, 57 N. J. Eq. 91; Scott v. Gallagher, 14 S. & R. (Pa.) 333; Ohio Ins. Co. v. Ross, 2 Md. Ch. 25. But this doctrine is repudiated in some states. Glass v. Hulbert, 102 Mass. 24,

34; Boggs v. Anderson, 50 Me. 161; Harris v. Arnold, 1 R. I. 125; Bush v. Golden, 17 Conn. 594. And, wherever possession is treated as notice, it must be actual, visible, and open occupation, inconsistent with the title of the apparent owner of record, not equivocal, occasional, or for a special or temporary purpose. Holland v. Brown, 140 N. Y. 344; Cornell v. Maltby, 165 N. Y. 557; Reagle v. Reagle, 179 Pa. St. 89; Hodge v. Amerman, 40 N. J. Eq. 99; Batavia v. Wallace, 78 Fed. Rep. 448; McAlpine v. Resch, 82 Minn. 523.

³ Ibid.

⁴ Le Neve v. Le Neve, 2 Lead. Cas. Eq. 35, note; Kettlewell v. Watson, L. R. 21 Ch. Div. 704; Williamson v. Brown, 15 N. Y. 354; Holland v. Brown, 140 N. Y. 344; Kirsch v. Tozier, 143 N. Y. 390; Anderson v. Blood, 152 N. Y. 285; Cornell v. Maltby, 165 N. Y. 557; Macon v. Mullahy, 145 Ill. 383; Bailey v. Galpin, 40 Minn. 319; Westinghouse v. German Nat. Bk., 188 Pa. St. 630; Swasey v. Emerson, 168 Mass. 118; Batavia v. Wallace, 102 Fed. Rep. 240, 244; Foxworth v. Brown, 114 Ala. 299.

is often classified as a form of actual notice.¹ Its two elements are, the existence of the trust or other right against the land, and knowledge by or notice to the purchaser sufficient to cause him, as a reasonable person, to institute an investigation, which, if properly prosecuted, would give him actual knowledge of the trust or right.² Thus, if a recorded deed in the chain of the title to the land refer to another deed or mortgage of the same property, although such other document is not recorded, this is notice to the purchaser or encumbrancer of all the rights in the land which a careful investigation would reveal as belonging to the beneficiaries of the mortgage or deed so indicated.³ And when one who is about to buy land is informed from a credible source that the vendor is going to sell it in order to defraud specific equitable lienors or creditors, he purchases with notice of the equities of all such persons, which a reasonable inquiry would have disclosed.⁴ (a)

(a) In New York, presumptive notice, as explained in the text, does not apply to the rights of creditors at large of the vendor, "having no special lien or equity," nor to purchases and sales of commercial paper, and probably not to those of other personal property. Without discussing this large subject here in detail, it may be stated briefly that (1) A purchaser of personal property, in order to be affected by notice of fraud on the part of his vendor, or any trust or equity attaching to the subject-matter, must have *actual* notice — knowledge or its equivalent by himself or his agent, *Parker v. Conner*, 93 N. Y. 118, 127, and the same rule is shown in that case to be followed in England; (2) A purchaser of realty is not affected by the rights of "creditors at large, having no special lien or equity," unless he has actual knowledge of such rights, or its equivalent, *Parker v. Conner*, 93 N. Y. 118, 125; *Stearns v. Gage*, 79 N. Y. 102; *Bush v. Roberts*, 111 N. Y. 278; *Jacobs v. Morrison*, 136 N. Y. 101; *Wilson v. Marion*, 147 N. Y. 589, and (3) A purchaser of realty, who has knowledge sufficient to put a reasonable person on inquiry as to any outstanding equity or specific lien or right, has notice of it if by reasonable investigation he could acquire actual knowledge of the same, *Williamson v. Brown*, 15 N. Y. 354; *Ten Eyck v. Witbeck*, 135 N. Y. 40; *Anderson v. Blood*, 152 N. Y. 285. "It is the duty of the purchaser of real estate to investigate the title of his vendor, and to take notice of any adverse rights or equities of third

¹ See *Flagg v. Mann*, 2 Sumn. (U. S. Cir. Ct.), 486, 556; *Bispham's Prin. Eq.* § 268; *Pomeroy's Eq. Jur.* § 753.

² *Cornell v. Maltby*, 165 N. Y. 557; *Jacobs v. Morrison*, 136 N. Y. 101; *Wilson v. Marion*, 147 N. Y. 589; *Pomeroy's Eq. Jur.* § 784; 1 *Perry on Trusts*, § 223.

³ *Sweet v. Henry*, 175 N. Y. 268; *Howard Ins. Co. v. Halsey*, 8 N. Y.

271; *Cambridge Valley Bk. v. Delano*, 48 N. Y. 326; *Reed v. Gannon*, 50 N. Y. 345; *Dingley v. Bon*, 130 N. Y. 607; *Gerard on Titles to Real Estate* (4th ed.), p. 664.

⁴ *Williamson v. Brown*, 15 N. Y. 354; *Anderson v. Blood*, 152 N. Y. 285; *Milliken v. Graham*, 72 Pa. St. 484; *Cox v. Miller*, 23 Ill. 476; *Story, Eq. Jur.* § 400 b.

It is to be added that, if a purchaser in good faith acquires the legal estate for value and without notice, so that he holds free and clear of the outstanding trust, he may convey as good a title to any one who has either kind of the above-described forms of notice,¹ provided the latter has not before owned the land bound by the notice or subject to the trust.² Thus, if A own the legal estate as a constructive trustee, and convey to B, who pays a valuable consideration and buys in good faith without notice of the trust, B may transfer a clear title to C, and C to D, etc., although all these latter are notified of the trust. Otherwise B might occupy the anomalous position of having an unassailable title, which he could not sell free and clear after the facts concerning the trust became notorious.³ But, since A has already been bound by the trust, he could not re-acquire the land freed from it, no matter how perfect might be the title of his immediate vendor.⁴

§ 408. **Second. Valuable Consideration.**—A valuable consideration here means something of worth, as money, money's equivalent, or marriage (marriage in the sense of the entering into the married state, and not an existing condition or *status* of being married), which is "the real inducement of the grant."⁵

persons which he has the means of discovering and as to which he is put on inquiry. If he makes all the inquiry which due diligence requires, and still fails to discover the substantial right, he is excused; but if he fails to use due diligence, he is chargeable, as matter of law, with notice of the facts which the inquiry would have disclosed. . . . The questions in such cases are first, whether the facts were sufficient to put the party on inquiry; and second, did he fail to exercise due diligence in making the inquiry? An affirmative answer to these two questions charges the party with notice as matter of law; but the notice, in all such cases to be found in the books, relates to some actual outstanding title, lien, or equitable interest." *Per* Rapallo, J., in *Parker v. Conner*, 93 N. Y. 118, 124.

¹ *Bumpus v. Platner*, 1 Johns. Ch. (N. Y.) 213; *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87; *Logan v. Eva*, 144 Pa. St. 312; *Rutgers v. Kingsland*, 7 N. J. Eq. 178, 658; *Bassett v. Nosworthy*, 2 Lead. Cas. Eq. 1, 33, note; 1 *Perry on Trusts*, § 222.

² *Taylor v. Russell* (1891), 1 Ch. 8, 27; *Bovey v. Smith*, 1 Vern. 149; *Clark v. McNeal*, 114 N. Y. 287; *Church v. Ruland*, 64 Pa. St. 432, 441; *Williams v. Williams*, 115 Mich. 477; *Cassidy v. Wallace*, 102 Mo. 575, 581.

³ *Bumpus v. Platner*, 1 Johns. Ch. (N. Y.) 213.

⁴ See last two preceding notes. "Whenever the chain of conveyances reaches an innocent purchaser for value, who takes the legal title, the doctrine of notice no longer applies." *Bispham's Prin. Eq.* § 265, citing *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 147.

⁵ *Ten Eyck v. Witbeck*, 135 N. Y. 40, 47. These three terms, "money, money's equivalent, or marriage" are here used as a terse summary of all those things that are a right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment,

In this connection, it is to be distinguished, not only from a good or meritorious consideration, but also from one that is merely *nominal*, such as one dollar, or any small sum, which is insignificant in comparison with the fair market value of the land, and is clearly not the actual moving cause of the conveyance. When such small sums are paid for properties worth vastly more, the transaction is generally in substance a gift — a transfer growing out of close relationship, or love and affection, or other actual consideration which is only “good,” and the amount recited in the deed, as one dollar, five dollars, and love and affection, etc., is nominal and not valuable.¹ In *Ten Eyck v. Witbeck*,² for example, the New York Court of Appeals held that a father’s deed to his daughter, of land worth twenty thousand dollars, for ten dollars, actually paid, and her agreement to hold the property in trust for her mother and brothers and sisters, was not made for a valuable consideration. In the opinion it was said: “We think it would be a perversion of language to say that a father, who had conveyed to a daughter property of the value of twenty thousand dollars for no greater sum than ten dollars paid, had sold the property to this child, or that she had bought it of him. The transfer would be recognized by the popular, as well as the judicial mind, as possessing all the essential qualities of a gift.”³ Any amount of money, however small, is in itself, of course, valuable. But when it bears no reasonable proportion to the fair market price of the land, and so is not “the real inducement of the grant,” it is only nominal; and the grantee does not occupy the position of an innocent purchaser for value. And even where the parties regard and treat a nominal sum as *the* consideration, its gross inadequacy is usually sufficient in itself to put the purchaser on inquiry as to any outstanding trust or equity in fraud of which the sale is being made, and so to prevent him from being an *innocent purchaser without notice*.⁴

loss, change of position, or responsibility, given, suffered, or undergone by the other. *Currie v. Misa*, 10 Ex. 153, 162; *Bassett v. Nosworthy*, 2 Lead. Cas. Eq. 5, 103–109; *City R. Co. v. Citizens St. R. Co.*, 166 U. S. 557, 566; *Corle v. Monkhouse*, 50 N. J. Eq. 537, 540; *Chilvers v. Race*, 196 Ill. 71; *Steele v. Steele*, 75 Md. 477; *Selman v. Lee*, 69 Ky. 215, 222; *Anson on Contracts*, p. * 83.

¹ *Ibid.*; *Doe v. Routledge*, 2 Cowp. 705; *Metcalfe v. Pulvertoft*, 1 Ves. & Bea. 180, 183; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; 1 *Perry on Trusts*, § 220.

² 135 N. Y. 40.

³ *Per* Maynard, J., at p. 44.

⁴ *Wagstaff v. Read*, 1 Ch. Cas. 156; *Bullock v. Sadlier*, Amb. 763, 764. Effects of inadequacy of consideration, § 405, *supra*. It is for this reason that

In some of the United States, moreover, such as New York, Vermont, Maryland, Michigan, and Arkansas, a conveyance of land to a creditor of the grantor, made only in satisfaction of or on account of the previously existing indebtedness, while good between the parties to the deed, does not make the grantee, as to outside claimants or lienors, an innocent purchaser for value. In order to occupy that position, he must give a *present* valuable consideration, advanced specially for the property.¹ The United States courts, however, and probably a majority of those of the states, take the opposite view and treat a conveyance or mortgage to individual creditors of the grantor or mortgagor, when properly made for the purpose of satisfying or reducing the debt, as putting them in the position of purchasers for value.² But, with the exception of Pennsylvania, and possibly one or two other states, this position is not accorded anywhere to assignees in insolvency or trustees in bankruptcy; but such takers, who acquire the land for pre-existing debts and not for themselves, but for others, are treated as mere volunteers.³

§ 409. **Third. Time of Notice and Payment.** — Notice to the vendee, at any instant before he has actually obtained his conveyance and paid the consideration in full, prevents him from being an innocent purchaser without notice. If he acquire notice after the deed has been delivered and accepted, but before payment of the entire purchase price, or after part or all of the consideration has been paid, but before the conveyance has passed, and then he complete the purchase, he takes the land subject to the interest or equity of which he thus obtained

a trustee can not convey a valid title to a purchaser from him for a nominal consideration. *Shriver v. Shriver*, 86 N. Y. 575.

¹ *Bay v. Coddington*, 5 Johns. Ch. (N. Y.) 34; *Rodgers v. Bonner*, 45 N. Y. 379; *Barnard v. Campbell*, 58 N. Y. 73; *Amer. Sugar Refining Co. v. Fancher*, 145 N. Y. 552; *Poor v. Woodburn*, 25 Vt. 234; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Ames Iron Works v. Kalamazoo Pulley Co.*, 63 Ark. 87; *Schloss v. Feltus*, 103 Mich. 525; *Starr v. Stevenson*, 91 Iowa, 684.

² *Bayley v. Greenleaf*, 20 U. S. (7 Wheat.) 46; *Bughman v. Central Bk.*, 159 Pa. St. 94; *Goodwin v. Mass. L. & T. Co.*, 152 Mass. 189, 199; *Nat. Revere*

Bk. v. Morse, 163 Mass. 383; *Longdale Iron Co. v. Swift's Iron Works*, 91 Ky. 191; *Koch v. Roth*, 150 Ill. 212; *Heitzfeld v. Bailey*, 103 Ala. 473; *Moore v. Holcombe*, 3 Leigh (Va.), 597; *Titcomb v. Wood*, 38 Me. 561; 1 *Perry on Trusts*, § 239.

³ *Donaldson v. Farwell*, 93 U. S. 631; *Mitford v. Mitford*, 9 Ves. 87, 100; *Chapman v. Tanner*, 1 Vern. 267; *Goodwin v. Mass. Loan Co.*, 152 Mass. 189, 199; *Belding v. Frankland*, 8 Lea (Tenn.), 67; *Burnett v. Bealmear*, 79 Md. 36; *Amer. Sugar Ref. Co. v. Fancher*, 145 N. Y. 552. See *Bughman v. Cent. Bk.*, 159 Pa. St. 94; *Longdale Iron Co. v. Swift's Iron Works*, 91 Ky. 191; *Chance v. McWorter*, 26 Ga. 315.

cognizance. This is the law as settled in England and most of the United States.¹ But, for the amount of money or other value actually paid before he acquired any notice, he has on the land a lien superior to the outstanding trust or equity of which he was notified.² And, in some of the American states, such as Pennsylvania, Missouri, and California, he is held to be a *bona-fide* purchaser for value of that proportion of interest in the realty which the amount of consideration paid by him before receiving notice bears to the entire contractual purchase price.³ Thus, if A, who had agreed to buy a lot of land from B for \$15,000, should receive notice, after taking the deed and paying only \$5,000 of the consideration, that B in selling would violate a trust in favor of C, A would own, independent of the trust, one-third of the land, if it were situated in Pennsylvania; while, if it were New York realty, he would simply have a valid lien on it for the \$5,000.⁴

It is to be reiterated here that one who can not establish all the requisites to a *bona-fide* purchase for value is usually a trustee to some extent of the land that he has bought; and, when he can prove all of them except the payment of a valuable consideration, the trust does not arise from any fraud on his part, either actual or presumed.⁵ (a)

§ 410. **Seeing to Application of Purchase Money.** — So careful were courts of equity of the rights of a *cestui que trust*, that they early required a purchaser from a trustee, who sold pursuant to a valid power, not only to be sure that the conveyance was properly and fairly made, but also to see to it that the purchase money was duly appropriated to the purposes of the trust. This is known as the doctrine of "seeing to the appli-

(a) "An implied or resulting trust shall not be alleged or established, to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust." N. Y. L. 1896 (Real Prop. L.), ch. 547, § 75, which was formerly 2 R. S. 728, § 54. See also N. Y. L. 1896, ch. 547, § 84. *Wood v. Robinson*, 22 N. Y. 564, 567; *Siemon v. Schurch*, 29 N. Y. 598, 613; *Baker v. Bliss*, 39 N. Y. 70.

¹ *Tourville v. Naish*, 3 P. Wms. 307; *Bassett v. Nosworthy*, 2 Lead. Cas. Eq. 1, 35, 77, note; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Patton v. Moore*, 32 N. H. 382; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Florence v. Zeigler*, 58 Ala. 221; 1 *Perry on Trusts*, § 221.

² *Weaver v. Barden*, 49 N. Y. 286, 293; *Sargent v. Eureka S. P. Co.*, 46

Hun (N. Y.), 19, 21; *Warren v. Wilder*, 12 N. Y. St. Rep. 757, 759.

³ *Juvenal v. Jackson*, 14 Pa. St. 519; *Paul v. Fulton*, 25 Mo. 156; *Davis v. Ward*, 109 Cal. 186; *Florence v. Ziegler*, 58 Ala. 221.

⁴ Last two preceding notes.

⁵ § 405, *supra*.

cation of the purchaser money.”¹ It was a natural outgrowth of the equitable theory that the land belonged to the beneficiary of the trust. Hence the purchaser must either pay the money to him, and obtain his valid receipt for the same, or, if, as was generally the case, this could not be done because of the incapacity of the *cestui* or otherwise, he must, if reasonably practicable, see that it was actually and properly applied for his benefit.² If the vendee failed to do his duty in this respect, however innocent and *bona fide* might otherwise be his purchase, he held the realty as a constructive trustee for the original beneficiaries.³

This principle has never been enforced in such a manner as to place an unreasonable burden upon the purchaser. When, therefore, the trust is so general or uncertain in character that it would cause great inconvenience to the vendee to follow the disposition of the purchase price, as, for example, in a trust to pay all the creditors of the settler, or to hold and apply the income to life beneficiaries, no court ever requires more than a *bona-fide* payment to the trustee.⁴ The rule is never applicable except to a well-defined and limited trust, such as one to sell and pay all the proceeds at once to a designated person, or to deposit them in a specified bank, or to pay one or two defined debts which are all that can participate in the fund.⁵

In England this doctrine or principle was abolished by statute in 1859;⁶ and the same result has been reached, either by statutes or by positive adjudications in most if not all of the states of this country.⁷ The general form of such statutes is that, “A purchaser who shall actually and in good faith pay a sum of money to a trustee, which the trustee as such is

¹ 2 Perry on Trusts, §§ 789, 790; Elliot v. Merryman, 1 Lead. Cas. Eq. p. *59, and notes.

² Weatherby v. St. Giorgio, 2 Hare, 624; Clyde v. Simpson, 4 Ohio St. 445; Foster v. Day, 27 N. J. Eq. 599.

³ 2 Perry on Trusts, § 790.

⁴ Stronghill v. Anstey, 1 DeG. M. & G. 635; Conover v. Stothoff, 38 N. J. Eq. 55; Turner v. Hoyle, 95 Mo. 337; Hughes v. Tabb, 78 Va. 313; 2 Perry on Trusts, §§ 794, 795.

⁵ Clyde v. Simpson, 4 Ohio St. 445; Elliot v. Merryman, 1 Lead. Cas. Eq. p. *52, note.

⁶ 22 & 23 Vict. ch. 35, § 23; 23 &

24 Vict. ch. 145, § 29; 44 & 45 Vict. ch. 41, §§ 36, 71.

⁷ N. Y. L. 1896, ch. 547, § 88; 1 Stim. Amer. Stat. L. § 1723; Woodward v. Jewell, 140 U. S. 247; Austin v. Hatch, 158 Mass. 198; Ind. etc. R. Co. v. Swannell, 157 Ill. 616; McArthur v. Robinson, 104 Mich. 540; Bank v. Looney, 99 Tenn. 278; Nat. Bk. of Com. v. Smith, 17 R. I. 244. “It may be stated that the strict English common-law rule is not favored by the American courts, although, in the absence of statutory regulation, they apply the doctrine in cases where it can not be avoided.” 2 Perry on Trusts, § 798.

authorized to receive, shall not be responsible for the proper application of the money, according to the trust.”¹ (a)

§ 411. **Equitable Mortgages and Liens.** — Whenever the owner of real property holds it subject to an outstanding lien or right which can be enforced only in equity, he is in a general sense a trustee for the benefit of the owner of such right. Many more instances might be given of the application of this broad principle. But it is enough here to add that some writers place equitable mortgages so called under the head of constructive trusts. Such are vendor's liens, vendee's liens, interests arising from the deposit of title-deeds as security for loans, etc. But these will be better understood as discussed hereafter in connection with mortgages, to which topic they more appropriately belong.

(a) This is the New York form, which adds: “And any right or title derived by him from the trustee in consideration of the payment shall not be impeached or called in question in consequence of a misapplication by the trustee of the money paid.” N. Y. L. 1896, ch. 547 (Real Prop. Law), § 88, which was formerly 2 R. S. 730, § 66. *Belmont v. O'Brien*, 12 N. Y. 394; *Thomas v. Evans*, 105 N. Y. 601, 615; *Dyett v. Central Trust Co.*, 140 N. Y. 54, 69; *Knoch v. Van Bermuth*, 144 N. Y. 643, 645. But the purchaser must, at his peril, take notice of the power of sale and of any defect therein. If he have anything whatever to make him know or surmise that a breach of trust is being committed or intended, or that the power is not being properly executed, he loses the benefit of the statute. *Kirsch v. Tozier*, 143 N. Y. 390; *First Nat. Bk. v. Nat. B'way Bk.*, 156 N. Y. 459, 468; *Moore v. Amer. L. & T. Co.*, 115 N. Y. 65, 79; *Benedict v. Arnoux*, 7 App. Div. 1; *Champlin v. Haight*, 10 Paige, 274.

NEW YORK REAL PROPERTY TRUSTS.

The preceding notes have explained the special features of the New York system of trusts. These may be profitably summarized here as follows: —

1. All passive express trusts are abolished; and an attempt to create such an interest, otherwise valid, vests the legal estate in the ultimate beneficiary or beneficiaries.

2. For the purpose of preventing as far as possible all separation of the legal and equitable estates, all forms of active express trusts except five are converted into mere powers in trust. The grantee, as such, of a power in trust does not hold the legal estate (as does a trustee), but it vests, together with the equitable interest, in the beneficiaries of the power. The four forms of active express trusts which were at first retained (and in which, of course, the trustee has the legal estate), are: “(1) To sell real property for the benefit of creditors; (2) To sell, mortgage, or lease real property, for the benefit of annuitants or other legatees, or for

¹ N. Y. L. 1896, ch. 547, § 88.

the purpose of satisfying any charge thereon; (3) To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto; (4) To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits prescribed by law." And to these was added a fifth form of active express trust in 1893, in the restoration of (5) the charitable use or trust. See note at end of Chapter XXI., pp. 493-503, *supra*.

3. All the four classes of resulting trusts, except one, are left substantially unaffected by the statutes. The one affected is that which is generally discussed as the first form—where the purchase price of real property is paid by one person and the legal estate is taken in the name of another. No trust now arises in New York, in such a case, unless it must be implied in order to prevent a fraud. § 360, note (a), *supra*.

4. The constructive trusts, as worked out and implied by equity, are left practically unaffected by the statutes. Beyond the provision that a *bona-fide* purchaser need not see to the application of the purchase money (§ 410, note (a), *supra*) no one of the groups, classes, or forms is abolished; and, in so far as legislation has dealt with them, it has been for the purpose and with the result of making them more definite and certain.

The chief statutes that affect New York trusts in real property are now grouped in the Real Property Law (L. 1896, ch. 547), §§ 70-93.

CHAPTER XXIV.

(3) EQUITY OF REDEMPTION.

§ 412. Its development in connection with mortgages.

§ 413. Its nature and extent.

§ 412. **Development of Equity of Redemption in Connection with Mortgages.**—A real estate mortgage is in form an absolute conveyance, accompanied by a clause of defeasance to the effect that if money be paid or some other act or condition be performed on or before a designated day,—called the “law day,”—the conveyance shall become null and void, but otherwise it shall remain in full force and effect. Before equity took any cognizance of such a contract, the courts of common law gave it a strict and rigid construction, and sustained a forfeiture of the mortgagor’s land if he let the law day pass without duly performing the condition. It was in the process of ameliorating the hardships thus frequently inflicted on mortgage borrowers that the courts of equity invented and carefully fostered the third form of equitable estate,—the “equity of redemption,”—the interest remaining in the mortgagor in consequence of the right being accorded him of redeeming the land from the mortgage, *after the law day*, by paying the principal of the debt and all accrued interest and costs down to the date of such payment. Many and varied attempts have been made by mortgagees to have this equitable right contracted away by mortgagors. But, acting on their maxim “once a mortgage always a mortgage,” the courts of equity have steadily and successfully resisted all such efforts. A fuller account of their strenuous enforcement of that maxim and their development of the modern mortgage is given hereafter.¹ It is sufficient here to state briefly the nature of the resultant equity of redemption.

§ 413. **Its Nature and Extent.**—The equity of redemption of a mortgagor still exists, as strictly and properly an equit-

¹ Chapter XXVI. *infra*.

able estate, in England, Massachusetts, and the New England states generally. In those jurisdictions, the mortgagee owns the *legal estate* in the land ; and all the remaining interest, which continues even after the law day until the mortgage is foreclosed or otherwise done away with, is the mortgagor's equitable estate. Such an interest, as will be hereafter more fully explained,¹ is subject to dower, curtesy, liability for debts of its owner and *in equity* to the incidents generally of landed property ownership. The process of evolving the modern mortgage has been carried to such an extent in the other American states that the mortgagor retains the *legal estate* in the land, the mortgagee has only a lien (which is personal property), and so no equity of redemption properly so called exists. But that form of estate, as it still remains in England and New England, is here described for the sake of completeness, and is to be understood as included with the uses and trusts when general mention is hereafter made of "equitable estates."

¹ Last preceding note.

PART IV.

ESTATES CLASSIFIED WITH REFERENCE TO THEIR CONDITIONAL OR QUALIFIED NATURE.

1. ABSOLUTE ESTATES.

2. QUALIFIED ESTATES.

CHAPTER XXV.

2. QUALIFIED ESTATES.

§ 414. Absolute and qualified estates.

§ 415. Qualified estates—Forms.

(1) *Estates on Condition.*

§ 416. Forms of conditions—Express conditions—not favored.

§ 417. Implied conditions.

§ 418. Conditions precedent.

§ 419. Conditions subsequent—Preferred.

§ 420. Conditions void, illegal, or impossible.

§ 421. Performance of conditions.

§ 422. Breach of conditions.

§ 423. Re-entry for breach. Forfeiture.

§ 424. Waiver of breach—Equitable relief.

§ 425. Who may re-enter for a breach of condition—Assignment of the right.

§ 426. Possibility of forfeiture—Right of entry.

(2) *Estates on Limitation.*

§ 427. How distinguished from other qualified estates.

§ 428. Expressions used to create estates on limitation.

§ 429. Effects of happening of specified event.

§ 430. Remainders and reversions after estates on limitation.

(3) *Estates on Conditional Limitation.*

§ 431. How distinguished from other estates.

§ 432. Expressions used to create estates on conditional limitation.

§ 433. Estates on conditional limitation are not favored by the common law.

§ 434. Means of indirectly creating estates on conditional limitation at common law.

§ 414. **Absolute and Qualified Estates.**—Most of the estates thus far discussed in this book are absolute. And such is the nature of the larger portion of the interests in lands, tenements,

and hereditaments with which the law has to deal. Being owned without restriction or condition, unqualified or absolute estates need only to be mentioned in this connection as a class that is contradistinguished from those that are qualified or conditional. The present chapter is to be devoted to the latter species of estates generally, except the fee tail, which is elsewhere explained; and the four next succeeding chapters will deal with that important modern outgrowth from the estate on condition — the mortgage.

§ 415. **Qualified Estates — Forms.** — The expressions “conditional estates,” “base estates,” and “qualified estates” have all been used to describe the different forms or interests in real property which are not absolute and unconditional. It will suffice here to employ the general term “qualified estates” to describe them all.¹ In addition to the fee tail, they are: (1) Estates on condition; (2) Estates on limitation; and (3) Estates on conditional limitation.

(1) An estate on condition is one which may be created, enlarged, diminished, or defeated by the happening or not happening of some contingent event.² Illustrations are found in a conveyance to A and his heirs, provided they continue to live on the land; to B for life, if he marry C; to X for ten years, provided, however, that he shall lose it if he attempt to assign or sublet his interest. The characteristics of such interests, which distinguish them from the other forms of qualified estates, are that in order to defeat them the designated event must happen and the grantor or his heirs must re-enter. Upon the concurrence of these two requisites, the property reverts to the grantor or his heirs.³

(2) An estate on limitation is one created by the use of words denoting duration of time, such as “while,” “during,” “so long as,” and the like — words which are translations of *donec*.⁴

¹ The various expressions used by different writers to describe these forms of estates, especially when they are fees in quantity, such as “limited,” “determinable,” “base,” “qualified,” “conditional,” “limitational,” etc., should not be allowed to engender confusion. See, for examples of such uses, 1 Prest. Est. pp. *24-*40, *480-*490; 1 Greenl. Cruise, Dig. p. 69; 4 Kent's Com. p. *9. All of the qualified estates but the fee tail, by whatever name they may be

designated, are included within the three forms described in the text; and to which of these belongs any such an interest dealt with by a case or textbook may ordinarily be easily determined from the context.

² Co. Lit. 201 a; 2 Blackst. Com. p. *152.

³ §§ 422, 423, *infra*.

⁴ Co. Lit. 214 b; 2 Blackst. Com. p. *155; Crabb on Real Prop. § 2135.

Illustrations are found in a transfer of property to A and his heirs, while they continue to live there; to B as long as he remains unmarried, etc. The distinctive features of such an estate are that when the event happens, which is thus designated as terminating the period, the estate ends naturally and necessarily without any re-entry by the grantor or his heirs, and the property reverts to them.¹

(3) An estate on conditional limitation is one which is conveyed to one person, so that, upon the happening or not happening of some contingent event (whether this be conditional or limitational), the estate shall depart from him and go over to another.² This may be illustrated by a grant of land to A and his heirs, but if he cease to live there then to B and his heirs; or by a devise to A for life on condition that, if he injure the building on the land, the property shall then go to B; or by a conveyance to A and his heirs, so long as he remains unmarried, and then to B for life. When such an interest as this is properly created, the happening of the designated event terminates the estate of the first holder; and the property passes to the other person without any entry or other act, either by him or by the grantor or his heirs.³

Of these three forms of qualified estates, that which presents the most questions for discussion here is the estate on condition. But each of them requires, in addition to the above outline, a brief separate discussion.

(1) *Estates on Condition.*

§ 416. **Forms of Conditions — Express Conditions not favored.** — The different kinds of conditions by which estates may be affected are classified as express or implied; precedent or subsequent; and valid, void, illegal or impossible.

Express conditions, sometimes called conditions in deed,⁴ are directly created by the terms employed by the parties. Such are those in the illustrations of estates on condition in the last preceding section. They are produced by hypothetical or conditional words such as "if," "but if," "provided

¹ Last preceding note; § 428, *infra*.

² Greenl. Cruise, Dig. vol. ii. p. 265, § 30; 2 Blackst. Com. p. * 155; Chase's Blackst. p. 294, n.; Brattle Sq. Church v. Grant, 3 Gray (Mass.), 142, 143, 147; Hatfield v. Sneden, 54 N. Y. 280. For

some of the different senses in which this term has been used, see Gray, Restraints on Alienation, § 22, note (2).

³ Ibid.; § 429, *infra*.

⁴ Lit. § 325; Greenl. Cruise, Dig. vol. ii. p. 2, § 3.

that," "if so be," "upon condition," "provided, however," etc.¹ These terms differ from what may be designated limitational expressions, in that they never indicate the running along of time, but simply refer to the happening or not happening of some uncertain event. In order that they may actually produce an estate on condition, they must be so employed by the parties as to make it certain that their intention is to create that kind of a determinable interest.²

The law does not favor conditions; and, where the phraseology employed by the parties is doubtful or reasonably susceptible of some other interpretation, it will not be decided that an estate on condition has been brought into being.³ Thus, mere use of the word "condition" will not make a stipulation in a deed of conveyance a condition subsequent, unless it plainly appears that the intention of the parties was that the grantor should have the right to re-enter if it were broken by the grantee.⁴ The clearest and most emphatic method of showing that intention is, of course, by a statement, in or connected with the words that are meant to create a condition, that the right of re-entry is reserved for its breach. But, if it be plainly apparent from the other language employed that it was intended that such a right should exist, the stipulation will be construed as a condition.

§ 417. **Implied Conditions, or Conditions in Law**, are such as legally inhere in the nature of the estate.⁵ Such is a condition in a grant of a franchise that it shall be used for some public utility,⁶ or the common-law restriction implied against the

¹ Lit. §§ 328-331; Co. Lit. 203 b, 204 b; *Portington's Case*, 10 Rep. 35 a, 41 b; *Langley v. Chapin*, 134 Mass. 82; *Stanley v. Colt*, 5 Wall. (72 U. S.) 119; *Mahoning County v. Young*, 16 U. S. App. 253.

² *Ibid.*; *Gibert v. Peteler*, 38 N. Y. 165, 168; *Young Women's Christian Home v. French*, 187 U. S. 401.

³ *Ibid.*; *Lake Superior, etc. Co. v. Cunningham*, 155 U. S. 354, 372; *United States v. Tenn. & C. R. Co.*, 176 U. S. 242; *Woodworth v. Payne*, 74 N. Y. 196; 1 Shars. & B. Lead. Cas. 123-126.

⁴ *Cunningham v. Parker*, 146 N. Y. 29, 33; *Clement v. Burtis*, 121 N. Y. 708; *Graves v. Deterling*, 120 N. Y. 447; *Stuart v. Easton*, 170 U. S. 383; *Brad-*

street v. Clark, 21 Pick. (Mass.) 389; *Greene v. O'Connor*, 18 R. I. 56; *Hoyt v. Kimball*, 49 N. H. 322; *Seovill v. McMahon*, 62 Conn. 378; *Sumner v. Darnell*, 128 Ind. 38. Courts prefer, when possible, to treat such statements as mere covenants, because thereby the possibility of forfeiture for breach is avoided.

⁵ Co. Lit. 215 a. "Estates upon condition implied in law, are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words." 2 Blackst. Com. p. *152.

⁶ *Brownell v. Old Colony R. Co.*, 164 Mass. 29; 2 Blackst. Com. p. *152; § 125, *supra*.

owner of a life estate to the effect that he should not attempt to convey by feoffment or fine more than his own interest.¹ These forms of conditions are not so numerous, and in some respects not so technical, as are those which are expressed.

§ 418. **Conditions Precedent.**—A condition precedent must be performed before the estate can vest. When, for example, a piece of property is conveyed to A and his heirs, provided, however, that he is not to own it until he marries B, the estate is affected by such a condition.² So is a gift to X for life, to be *enlarged* into a fee, if he marry Y.³ The full discussion of this form of condition belongs to the chapter on future estates. For an interest which depends for its vesting upon an event to happen in the future will be a contingent remainder or an executory estate.⁴

§ 419. **Conditions Subsequent preferred.**—A condition subsequent affects an interest which is already vested; and it either diminishes or defeats that interest.⁵ Thus a conveyance to A and his heirs, but if he marry B, then to him only for his life, and an estate to C for years or for life or in fee, provided, however, that he is to lose it if D come back from Rome, or if he fail to erect a building upon it, are estates on condition subsequent.⁶

When a condition is seen to affect an estate, the courts prefer to treat it, if reasonably possible, as subsequent rather than precedent.⁷ This is a very strong and frequently illustrated

¹ Lit. §§ 415, 416; 2 Blackst. Com. p. * 274.

² See *Weston v. Foster*, 7 Met. (Mass.) 297; *Nevius v. Gourley*, 95 Ill. 206; *Vanhorne v. Dorrance*, 2 Dall. (Pa.) 304, 317; 2 Blackst. Com. p. * 154.

³ Such a condition as this, which is of rare occurrence, affects only the future estate to be added if the event occur, and as to that estate it is clearly precedent. Thus, in the illustration here given, X owns an unconditional life estate; and the fee, which may or may not become his, is a *contingent remainder* depending upon the condition precedent of his marrying Y. It is therefore properly discussed hereafter as one of the forms of such remainders. See Cruise, Dig. tit. xiii., ch. i. § 7, tit. xvi. ch. ii. §§ 35, 36.

⁴ It is a contingent remainder when it is so made that it may vest in pos-

session at the termination of a prior particular estate on which it depends, if, in the meantime, the event occur in its favor; it is an executory estate when it does not rest on any particular estate, but simply depends on the happening of the specified event. See the nature of contingent remainders explained, §§ 575, 587, *infra*, and that of executory estates, §§ 565, 616, *infra*.

⁵ Co. Lit. 201 a; Greenl. Cruise, Dig. tit. xiii. ch. i. § 6, and note 1.

⁶ Lit. § 325; *Watters v. Bredin*, 70 Pa. St. 235; *Trustees of Union College v. City of New York*, 173 N. Y. 38; *Lake Superior, etc. Co. v. Cunningham*, 155 U. S. 354; *Monroe v. Bowen*, 26 Mich. 523.

⁷ *United States v. Tenn. & C. R. Co.*, 176 U. S. 242; *Lake Superior, etc. Co. v. Cunningham*, 155 U. S. 354, 372; *Nicoll v. N. Y. & E. R. Co.*, 12 N. Y. 121; *Donnelly v. Eastes*, 94 Wis. 390.

preference; and it is also a conspicuous application of the general principle, running through all the common law, that a right or an interest once conveyed or transferred, which may be looked upon as great and important or as of lesser significance, shall be treated and construed preferably in the former sense.¹ The determination of whether a condition is precedent or subsequent depends ultimately on the intention of the parties as ascertained from their language and all the facts of the case; but, when such intent does not clearly appear, the rule now followed, and based on this general principle of preference, is that "if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, or if the act may as well be done after as before the vesting of the estate," then the condition is subsequent.²

§ 420. **Conditions void, illegal, or impossible.** — The conditions heretofore illustrated have been valid and enforceable. An instance of a void condition may be found in one which is repugnant to the nature of the estate granted; as if, for example, land were conveyed to A and his heirs, provided that he should never take any profits or emoluments therefrom.³ An illegal condition would be found in a transfer of property to become void if the grantee did not commit murder or larceny. So if the stipulation be in illegal restraint of trade, or of marriage, or violate general public policy.⁴ With regard to conditions in restraint of marriage, it will here suffice to say, so far as real property is concerned, that they are generally held to be valid and enforceable, if precedent in their nature or if subsequent and reasonable as to time and circumstances. Otherwise they are illegal and void.⁵ Thus a provision that a grantee

¹ Acting on this general principle, in cases where the parties have not made their meaning clear, courts treat an estate as vested in possession rather than future, a remainder as vested rather than contingent, and any future estate as a remainder of some kind rather than an executory interest. So they always tend to hold that a condition subsequent has not been broken, unless a breach has clearly occurred, and thus to retain the estate and prevent a forfeiture. See § 579, *infra*, and also the discussion of the future estates generally.

² *Underhill v. Saratoga R. Co.*, 20

Barb. (N. Y.) 455. And see cases cited in last preceding note; *Finlay v. King's Lessee*, 3 Pet. (28 U. S.) 346; *Burdis v. Burdis*, 96 Va. 81; *In re Stickney's Will*, 85 Md. 79.

³ *Cruise*, Dig. tit. xiii. ch. i. §§ 20, 21; *Smith v. Clark*, 10 Md. 186.

⁴ *Cruise*, Dig. tit. xiii. ch. i. § 19; *United States v. Freight Ass'n*, 166 U. S. 290; *Scott v. Tyler*, 2 Lead. Cas. Eq. 120; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 372.

⁵ *Phillips v. Ferguson*, 85 Va. 509; *Smythe v. Smythe*, 90 Va. 638; *Randall v. Marble*, 69 Me. 310; *Bostick v. Blades*, 59 Md. 231; *Story's Eq.*

should never own the estate until he married, or that, taking it, he should lose it if he married before he was twenty-five years of age, would be enforced; but a condition subsequent absolutely prohibiting marriage of the owner of the property, or restricting it until he should become old—say fifty years of age—would be null and void.¹

With these qualifications, it may be stated generally that void and illegal conditions are inoperative and do not affect the estate at all when they are subsequent;² but that, when they are conditions precedent, since they can not be legally performed and the estate can not vest without their performance, the interest attempted to be conveyed naturally fails. A devise, for example, to A and his heirs, it being understood, however, that he shall lose it if he fail to commit murder, or any other specified crime, gives to A an indefeasible estate in fee simple;³ while a grant to X and his heirs, not to take effect unless he commits a felony, confers no right or interest whatever upon him.⁴

The same principles are ordinarily applicable to conditions

§§ 288, 289; 2 Pom. Eq. Jur. § 933; Cruise, Dig. tit. xiii. ch. i. §§ 53-67; 35 Cent. Law Jour. 385.

¹ Scott v. Tyler, 2 Lead. Cas. Eq. 120, note; Phillips v. Ferguson, 85 Va. 509; Hogan v. Curtin, 88 N. Y. 162; Graydon's Ex'rs v. Graydon, 23 N. J. Eq. 229; 2 Pom. Eq. Jur. § 933. It is reasonable for a deceased husband or wife to devise realty to the other with a condition against remarriage. Bostick v. Blades, 59 Md. 231; Giles v. Little, 104 U. S. 291; Knight v. Maroney, 152 Mass. 523, 525; Herd v. Catron, 97 Tenn. 662; Bispham's Prin. Eq. § 227, citing Allen v. Jackson, L. R. 1 Ch. Div. 399.

² Ibid.; Monroe v. Hall, 97 N. C. 206; Randall v. Marble, 69 Me. 310; Williams v. Cowden, 13 Mo. 211; 1 Story's Eq. Jur. §§ 283, 288, 289; Bispham's Prin. Eq. §§ 226, 227; 12 Law Quart. Rev. 36. There is much confusion in the books as to conditions in restraint of marriage. But most of it relates to personality, and arises from the fact that some courts give more weight and some less to the civil-law rule, which is very stringent against such conditions.

See Bispham's Prin. Eq. § 225. In several cases in this country, it has been decided that any restraint made by words of *limitation*—as to a person “while” he remains unmarried, or “so long as” he does not marry—is valid, although it would be void if in the form of a condition subsequent—as to A and his heirs on condition that he never marries. Arthur v. Cole, 56 Md. 100; Hotz's Est., 38 Pa. St. 422; Selden v. Keen, 27 Gratt. (Va.) 576; Randall v. Marble, 69 Me. 310; Courter v. Stagg, 27 N. J. Eq. 305; Little v. Birdwell, 21 Tex. 597; Crawford v. Thompson, 91 Ind. 266. But this distinction is not approved as to real property by the English courts, nor by some of the best writers. Jones v. Jones, L. R. 1 Q. B. Div. 279; 2 Jarm. on Wills (Bigelow's ed.), 886; 6 Gray's Cas. 23, n.

³ Brandon v. Robinson, 18 Ves. 429; Lovett v. Gillender, 35 N. Y. 617; Co. Lit. 206 b.

⁴ Co. Lit. 206 a, b, 218 a; Taylor v. Mason, 9 Wheat. (22 U. S.) 325, 350; Martin v. Ballou, 13 Barb. (N. Y.) 119; Parker v. Parker, 123 Mass. 584.

which are impossible in their nature, such as a stipulation that the grantee shall go to Europe in one day, or shall support a person who has died before the gift or grant can become operative.¹ But when the performance of any condition is rendered impossible by the act of the grantor, or, being a condition implied in law, it becomes impossible by the act of God or by the operation of statute or other legal requirement, it falls away from the estate, and the estate itself becomes absolute and indefeasible.²

§ 421. **Performance of Conditions.** — Any one interested in the property may validly perform a condition, and thus cause the estate to vest, or prevent forfeiture, as the case may be.³ In cases in which the estate has been created by devise, and is on condition subsequent, and nothing is said as to the time of performance, the devisee is presumed to have the period of his life in which to comply with its requirements.⁴ But when the property has been transferred by act *inter vivos*, and there is nothing in the language employed to indicate the time of performance, or that such time is immaterial, the grantee is ordinarily given merely a reasonable time within which to do or bring about what is required.⁵ Of course, there are many conditions subsequent over which the owner of the property has no control. The words used in the creation of these, or their own inherent nature will uniformly determine the time when the events specified must occur, if ever.

§ 422. **Breach of Conditions.** — Not only does the law dislike conditions and prefer, when feasible, to construe stipulations as covenants, which do not work forfeitures,⁶ but also, when the words must reasonably be construed as creating a condition, and there exists any room for doubt as to whether or not it has been broken, the courts lean strongly in favor of holding

¹ Roundel v. Curren, 2 Bro. Ch. 67; Hughes v. Edwards, 9 Wheat. (22 U. S.) 489; 2 Blackst. Com. p. *156; Co. Lit. 206 a.

² Baker v. Women's Christian Tem. Un., 57 N. Y. App. Div. 290; Hughes v. Edwards, 9 Wheat. (22 U. S.) 489; Taylor v. Sutton, 15 Ga. 103; Co. Lit. 206 a. Mere *personal* impossibility on the part of him who should perform a condition will not relieve him from the effects of its breach, nor will impossibility caused by the act of God be an excuse for one who has unqualifiedly

assumed the performance of the condition. See Paradine v. Jane, Aleyn, 27; Harmony v. Bingham, 12 N. Y. 99; Pollock, Cont. (6th ed.) 410, 418.

³ Wilson v. Wilson, 38 Me. 18; 2 Crabb, Real Prop. § 2163.

⁴ Co. Lit. 208 b, 209 a; Finlay v. King, 3 Pet. (28 U. S.) 346, 376.

⁵ Trustees of Union Col. v. City of New York, 173 N. Y. 38; Allen v. Howe, 105 Mass. 241; Pierce v. Brown Univ., 21 R. I. 392; Co. Lit. 208 b.

⁶ § 416, *supra*.

that there has been no breach.¹ It is not enough, therefore, to defeat an estate on condition, to show that the letter of the stipulation has been violated, "but it must appear that its true spirit and purposes have been wilfully disregarded."² Thus, where the condition annexed to a grant of vacant property to be used as a public square was that the grantee should never allow it to be built upon, an inadvertent encroachment of three or four inches, by a neighboring builder, did not constitute a breach of the condition and gave no right of re-entry to the grantor.³

§ 423. **Re-entry for Breach — Forfeiture.** — The mere fact alone that a condition subsequent is broken by the landowner does not defeat his estate. It simply gives to the grantor or his heirs or their successors in interest the right to re-enter and take back the property; and this latter act, or its equivalent, must be done before the title of the holder on condition is divested.⁴ Thus, if A own land conveyed to him on condition that he cut no trees from it, he does not lose it merely by cutting trees; but for such a breach the grantor may re-enter and thus defeat the estate.⁵ Since the time when the action of ejectment was moulded into its present form in England, it has been decided in that country, and it is now generally held in the United States also, that an action of ejectment, or its equivalent statutory procedure under the codes, need not be preceded by actual entry on the land for the breach. The institution of the action is equivalent to entry.⁶ So, when the person entitled to

¹ *Riggs v. Pursell*, 66 N. Y. 193; *Woodworth v. Payne*, 74 N. Y. 196; *Cunningham v. Parker*, 146 N. Y. 29, 33; *Merrifield v. Cobleigh*, 4 Cush. (Mass.) 178, 184; *Page v. Palmer*, 48 N. H. 385; *Sumner v. Darnell*, 128 Ind. 38; *Gadberry v. Sheppard*, 27 Miss. 203.

² *Rose v. Hawley*, 141 N. Y. 366, 378; *Hoyt v. Kimball*, 49 N. H. 322. See *United States v. Tenn. & C. R. Co.*, 176 U. S. 242.

³ *Rose v. Hawley*, 141 N. Y. 366.

⁴ *United States v. Tenn. & C. R. Co.*, 176 U. S. 242; *Schlesinger v. Kansas City, R. Co.*, 152 U. S. 444; *Fonda v. Sage*, 46 Barb. (N. Y.) 109; *Upington v. Corrigan*, 151 N. Y. 143; *Osgood v. Abbott*, 58 Me. 73; *Green v. Pettingill*, 47 N. H. 375. The entry or demand must be with intent to produce

a forfeiture. *Bowen v. Bowen*, 18 Conn. 535; *Trustees of Union College v. City of New York*, 173 N. Y. 38. Until a forfeiture is thus enforced, the estate on condition is regarded as having the ordinary incidents and attributes of absolute and indefeasible estates. Therefore, the United States government, having conveyed property in fee on condition, and the condition having been broken, could not maintain an action against a stranger for trespassing on the land until it had defeated the grantee's estate by re-entry or its equivalent. *United States v. Loughrey*, 172 U. S. 206.

⁵ *Ibid.*

⁶ *Jones v. Carter*, 15 M. & W. 718; *Cowell v. Colorado Springs Co.*, 100 U. S. 55; *Schlesinger v. Kansas City R. Co.*, 152 U. S. 444; *Plumb v. Tubbs*,

the benefit of the breach is already in possession, that fact is, of course, equivalent to his re-entry.¹ And a claim, duly made in consequence of the breach, is sufficient when the property is incorporeal and so not subject to a physical entry.²

When these two events — breach of the condition and re-entry or its equivalent — have concurred, the estate on condition is defeated *ab initio*; the grantor, his heirs, or their successors in interest, re-acquire the property in the same plight as if such estate had never existed, and all the liens and interests which the holder on condition may have created are thereby entirely swept away.³

§ 424. **Waiver of Breach — Equitable Relief.** — If the party entitled to enforce a forfeiture for breach of condition knowingly and expressly permit its violation, he can not re-enter for such breach.⁴ So, if after the stipulation is broken he waive his right, as by accepting payment of arrears of rent accruing after the breach, or agreeing not to take advantage of the wrong, he is precluded from regaining the property for that violation of the condition.⁵ And the rule of *Dumpor's Case* in the early common law,⁶ now repudiated by statute in England⁸ and generally treated with disfavor in this country,⁷ but still adhered to in New York, Maryland, and possibly in one or two other jurisdictions, is that an express permission of the owner once to violate a condition in deed (in *Dumpor's Case*, it was a condition against assigning a lease) destroys the con-

41 N. Y. 442; *Austin v. Cambridgeport*, 21 Pick. (Mass.) 215. *Contra*, *Preston v. Bosworth*, 153 Ind. 458.

¹ *Lincoln & K. Bk. v. Drummond*, 5 Mass. 321; Co. Lit. 218 a.

² Co. Lit. 218 a.

³ *Moore v. Pitts*, 53 N. Y. 85; *McKelway v. Seymour*, 29 N. J. L. 321, 329; *Winnepesaukee C. M. Ass'n v. Gordon*, 67 N. H. 98; Co. Lit. 201 a, n. 84; 1 Prest. Est. p. *46.

⁴ *Williams v. Dakin*, 22 Wend. (N. Y.) 201; *Birdsall v. Grant*, 37 N. Y. App. Div. 348; *Thropp v. Field*, 26 N. J. Eq. 82; *Moses v. Loomis*, 156 Ill. 392; *Alexander v. Alexander*, 156 Mo. 413.

⁵ *Goodright v. Davids*, Cowp. 803; *Davenport v. Reg.*, L. R. 3 App. Cas. 115; *Jackson v. Crysler*, 1 Johns. Cas. (N. Y.) 125; *Conger v. Duryee*, 90 N. Y. 594; *Hubbard v. Hubbard*, 97

Mass. 188; *Andrews v. Senter*, 32 Me. 394; *Moses v. Loomis*, 156 Ill. 392. Acceptance of arrears of rent which accrued before breach of condition does not constitute a waiver. *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Miller v. Prescott*, 163 Mass. 12; *Crabb*, Real Prop. § 2196. But the cases are not entirely in harmony as to the effect of such acceptance. See *Medinah T. Co. v. Currey*, 162 Ill. 441; *Hunter v. Osterhaut*, 11 Barb. (N. Y.) 33.

⁶ 4 Rep. 119; 1 Smith's L. C. p. *47; *Brummel v. Macpherson*, 14 Ves. 173.

⁷ 22 & 23 Vict. ch. 25, §§ 1-3.

⁸ Notes to *Dumpor's Case*, 1 Smith's L. C. p. *47, *51 *et seq.*; *Kew v. Trainor*, 150 Ill. 150; *Alexander v. Hodges*, 41 Mich. 691; Note in 7 Amer. Law Rev. 616.

dition altogether, and makes his estate absolute.¹ Indeed, in New York, this rule seems to have been extended rather than restricted; for it has been there held that an *implied* waiver of a prior breach by a tenant for years, shown by the landlord's acceptance of rent, would do away with the condition so broken.²

It is to be added that when there is a breach of a condition, for which the grantor has a legal right of re-entry, and for which compensation can be made, equity will ordinarily grant relief upon the terms that remuneration in money or other value shall be made for the breach, or that the grantor shall in some other manner be placed *in statu quo*; and that court will be quick to do this when the breach is unwitting or accidental.³

§ 425. **Who may re-enter for a Breach of Condition — Assignment of the Right.** — The right to re-enter for a condition broken has its roots in the feudal system. It is an outgrowth of the lord's right in case a vassal violated his feudal obligations. Therefore, the ownership of an express condition and the right of re-entry for its breach, except in so far as they are modified by statute, are personal to the grantor and his heirs.⁴ An express condition (or condition in deed) can not be validly reserved, at common law, to any one except the grantor and his heirs; and neither it nor any right to enforce a forfeiture for its infraction can ordinarily be assigned, or even devised away, unless the authority so to deal with it has been created by statute.⁵ Being incident to a particular estate, as if, for

¹ *Murray v. Harway*, 56 N. Y. 337; *Reid v. Weissner Brewing Co.*, 88 Md. 234; *Porter v. Merrill*, 124 Mass. 534; *McKibbe v. Darracott*, 13 Gratt. (Va.) 278.

² *Murray v. Harway*, 56 N. Y. 337, 343; *Clark v. Greenfield*, 13 N. Y. Misc. 124, 126; *Koehler & Co. v. Brady*, 78 Hun (N. Y.), 443. And see *Smith v. Rector*, etc. St. P. Ch., 107 N. Y. 610, 619; *Wertheimer v. Hosmer*, 83 Mich. 56; *Jones v. Durrer*, 96 Cal. 95; *Gulf, C. & S. Ry. Co. v. Settegast*, 79 Tex. 256; *Pennock v. Lyons*, 118 Mass. 92; *Sharon Iron Co. v. City of Erie*, 41 Pa. St. 341, 349. "The ground of this doctrine is that every condition of re-entry is entire and indivisible; and, as the condition had been waived once, it cannot be enforced again." *Wms. Real Prop. p. *398*.

³ *Wafer v. Mocato*, 9 Mod. 112; *Davis v. Gray*, 16 Wall. (83 U. S.) 203, 230; *Noyes v. Anderson*, 124 N. Y. 175; *Mactier v. Osborn*, 146 Mass. 399; *Grigg v. Landis*, 21 N. J. Eq. 494; 1 Pom. Eq. Jur. § 453. "In every such case, the true test (generally, if not universally) by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can be made or not. If it cannot be made, then courts of equity will not interfere." 2 Story's Eq. Jur. § 1314. See *Ibid.* §§ 1313-1323; *Greenl. Cruise*, Dig. tit. xiii. ch. ii. §§ 29-35, and note.

⁴ *Co. Lit.* 201 a, *Butler's note* (84); *Fearne*, Cont. Rem. p. 381.

⁵ *Ibid.*; *Avelyn v. Ward*, 1 Ves. Sr. 420; *Jackson v. Topping*, 1 Wend. (N. Y.) 388; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Gibert v. Peteler*, 38

example, an estate for years or life were granted away on condition by the owner of the fee, if the latter attempted to assign his reversion and the right to enter for a breach, the condition was thereby destroyed entirely; for the assignor could not enforce it because he had parted with it, and yet the assignee acquired nothing in it that he could enforce, because it was not assignable.¹ Implied conditions, being raised by law and inherent in the estate by its nature, have not been held subject to these stringent and technical rules; but they could be enforced by the devisees or assignees of the original owners.²

By the act of 32 Hen. VIII. ch. 24, the right to enforce express conditions, including, of course, entry and taking back the land, against owners of estates for years and for life, was made assignable with the reversion; and that statute has been either substantially re-enacted or tacitly adopted in most if not all of the United States.³ (a) *But it does not apply to a condition annexed to an estate in fee.*⁴ It may be added, however, that in Massachusetts, Illinois, and possibly some other states, a devisee of a grantor of an estate in fee on condition has been accorded the privilege of entering and terminating the estate for breach of the condition.⁵

§ 426. **Possibility of Forfeiture — Right of Entry.** — From the preceding paragraph, it is apparent that, while the landlord

(a) It has been re-enacted in New York, and is now L. 1896, ch. 547, § 193, which section is quoted and explained in the note on New York Manor Lands, at the end of Ch. XVII. *supra*.

N. Y. 165; Vail v. Long I. R. Co., 106 N. Y. 283; Merritt v. Harris, 102 Mass. 326; Hooper v. Cummings, 45 Me. 359. The reason for this technical rule was to prevent maintenance. Greenl. Cruise, Dig. tit. xiii. ch. 1, § 15; Co. Lit. § 357.

¹ Ibid.; Rice v. Boston & W. R. Corp., 12 Allen (Mass.), 141; Hooper v. Cummings, 45 Me. 359; Boone v. Clark, 129 Ill. 466.

² Crabb, Real Prop. § 2190; Co. Lit. 214.

³ 1 Stim. Amer. Stat. L. § 1352.

⁴ Co. Lit. 215 b; Ruch v. Rock Island, 97 U. S. 693; Nicoll v. N. Y. & E. R. Co., 12 N. Y. 121; Upington v. Corrigan, 151 N. Y. 143; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80.

⁵ Austin v. Cambridgeport, 21 Pick. (Mass.) 215, 224; Stearns v. Harris, 8 Allen (Mass.), 597; Kenner v. Amer. Contract Co., 9 Bush (Ky.), 202. See Boone v. Clark, 129 Ill. 466. In 2 Wash. Real Prop. (6th ed.) § 955, note 5, it is said that the Massachusetts peculiar rule has arisen from the construction of a local statute. As already stated, local statutes may readily change these rules, and in some few instances have done so. See Stat. 8 & 9 Vict. ch. 106, § 6; Leake, Land Law, p. 59; Hoyt v. Ketcham, 54 Conn. 60; Southard v. Cent. R. Co., 26 N. J. L. 13. See also the following section of the text for a fuller discussion of conditions subsequent in connection with grants in fee.

or the reversioner who owns the property subject to an estate for years or life on condition may now sell or otherwise transfer his interest, in such manner that he who takes it may enforce the condition; yet the grantor of an estate in *fee on condition*, having no right or interest left in the property other than the mere chance of regaining it because of a breach, can not in any way alien such mere chance or right, except in the few jurisdictions in which the power to do so is given by local statute, but must either release it to the owner of the property, or upon his own death let it pass to his heirs. These two things he can do with it, and, with the exception of the additional rights arising from local statutes, they are the only two dispositions of it which he can make.¹ This mere right, or chance of regaining by forfeiture an estate which one has transferred in fee on condition, is said by high authority to be, not an estate, interest, or reversion, nor, properly speaking, a possibility of reverter. The most exact designation of it is a "possibility of forfeiture." If it be not released to the owner of the land, it passes to the heirs of the grantor, not by way of descent, but by *representation*.² It is to be carefully noted, as the one remaining right or incident connected with real property of to-day which, by the prevailing rule, can not be sold, given away, or otherwise aliened. (*a*)

(*a*) In the note on New York Manor Lands, at the end of Chapter XVII. *supra*, it is explained that conditions authorizing re-entry for non-

¹ Last two preceding notes. But see Co. 202 a; Gray, Perpetuities, § 13.

² *Upton v. Corrigan*, 151 N. Y. 143, 149; 4 Kent's Com. p. *17, note (*b*). The expression "possibility of reverter" has been used in a variety of senses. Its history and meaning are explained in Butler's note to Fearn, Cont. Rem. p. 381, as follows: "It is generally understood that lands were granted originally for the life only of the grantee, then to him and his lineal heirs, and then to him and his lineal and collateral heirs: and that on every such grant, whether it were for life or in fee, a right remained in the grantor to the services of the grantee, during the continuance of his estate, and to a return of the land on its expiration. Whether this right of the grantor depended on an estate for life, or in fee, it was of the same nature, and indifferently called

his *reverter* or *escheat*; but, from the remoter probability of the return, when the fee was granted, it became customary to call it after the grant of the fee his *possibility of reverter*; by degrees that expression was applied to those cases only where a limited fee had been granted, and the word *escheat* was applied to those where the grant had conferred an absolute estate in fee simple. A grant to a man and the heirs of his body was at common law a limited fee; and, therefore, after such a grant, a possibility of reverter was said to remain in the grantor. When the statute *de donis* converted such fees into estates tail, the return of the land was secured by it to the donor, and was called his *reverter*. In all these cases the words *reverter* and *reversion* are synonymous." See, also, Gray, Perpetuities, §§ 32-41; § 430, *infra*.

(2) *Estates on Limitation.*§ 427. **How distinguished from other Qualified Estates.**—

The chief characteristic of estates on limitation, distinguishing them from other qualified estates, is that they terminate *naturally* when the designated event occurs, and the property returns to the grantor or his heirs without the necessity for any re-entry on their part. Thus, when land is conveyed to A as long as he shall live upon it, it will revert to the grantor as soon as A ceases to reside there. Also, property conveyed to one and his heirs while the waters of the Delaware River shall flow, must, as far as such conveyance is concerned, revert to

payment of proceeds of perpetual rents reserved on grants of land in fee may be enforced by the grantors personally, or by their heirs, *devisees*, or *assigns*, and that this result has been worked out as a common-law principle, and in reality without the aid of statute. This may appear, at first sight, to be an exception to the emphatic principle stated in the text. But the conditions, in such cases, are *incident to the rents reserved by the grantors*. They are not mere possibilities of forfeiture. They are owned together with and incident to incorporeal hereditaments. They can be assigned *with such property*. But, not being in themselves property, they could not be assigned or devised alone. For example, it is provided by statute in New York that a testator may devise every *estate and interest* in real property that is descendible to heirs. R. S. 9th ed. p. 1875 (2 R. S. 56), § 2. On the strength of this statute, the residuary devisee of one who had granted away land in fee on condition—reserving no rent, but merely providing for forfeiture by the grantee if a certain stipulation were broken—sought to enforce a forfeiture for breach of the condition. But it was held that this right belonged to the *heirs* of the grantor and not to the devisee, because not being an *estate* or *interest* it was not affected by the statute. *Upington v. Corrigan*, 151 N. Y. 143. In the opinion in that case, Gray, J., after summarizing the leading case of *Nicoll v. N. Y. & E. R. Co.*, 12 N. Y. 121, says: “After speaking of the change made in England by 32 Henry the VIII. ch. 34, and in our Revised Statutes, which permitted the assignment of a right of entry in case of grants, or leases in fee, reserving rents, and of leases for lives or for years, the opinion continues: ‘There was a reason for the statutory change in the particular cases mentioned; for in them the grantor had an interest independent of the possibility of reverter. . . . But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a *possibility of reverter*, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone.’” And he also explains (p. 149) that, technically speaking, this bare right is not a “possibility of reverter,” but rather a “*possibility of forfeiture*,” although it is called the former in his quotation.

the grantor or his heirs if such waters ever cease to flow. Estates on limitation are thus naturally ending interests, and are not prematurely cut off or carried over to other parties by the happening or not happening of the contingent events.¹ They have been often spoken of as estates on special limitation, or collateral limitations; but the term here used — limitation, simply — accurately describes them, and is now used by the best authorities in the sense here employed.²

Limitations may be annexed to interest of any fixed quantity — to an estate in fee, or for life, or for years. A gift to A and his heirs, so long as they continue to live there, is a fee on limitation;³ to a widow, while she remains unmarried, a life estate on limitation,⁴ and to B for ninety-nine years, or during his life if he die within that time, an estate for years on limitation.⁵

§ 428. **Expressions used to create Estates on Limitation.** — As shown above, such interests as these arise from the employment of expressions denoting the running along of time, such as “while,” “during,” “as long as,” “during the continuance of,” and the like. All these may be readily remembered as English translations of “*donec*.” The difference between them and the conditional or hypothetical expressions used in the

¹ Crabb, Real Prop. § 2135; Chase's Blackst. p. 294; Hatfield v. Sneden, 54 N. Y. 280, 285.

² Ibid.; Stuart v. Easton, 170 U. S. 383; First Univ. Soc. of N. Adams v. Boland, 155 Mass. 171; Gray on Restraints on Alienation, § 22, n. 1. “These special limitations,” says Fearn, “are sometimes termed collateral limitations. And if the term ‘collateral limitations’ is used as referring to an event which is collateral to the general limitation, it is not inaccurate. But if the term is used from a notion that these limitations form no part of, and are collateral to, the original measure of the estate, in the same manner as a conditional limitation, or a condition subsequent properly so called, such a notion is inaccurate, and the inaccuracy is one of a fundamental and most important character. . . Thus, in the above-mentioned case of an estate limited to A for ninety-nine years, if he shall so long live; there is but one original and

eventual measure of A's interest, depending on the effluxion of the ninety-nine years, or the dropping of his life, which shall first happen. The fact that these special limitations are not collateral to the original measure given to the estates to which they are annexed, constitutes the fundamental distinction between them and conditional limitations specifically and properly so called.” 2 Fearn, Cont. Rem. (Smith's ed.) § 36. And see 1 Prest. Est. p. * 42.

³ Poole v. Needham, Yelv. 149; Dodge v. Stevens, 94 N. Y. 209; Stilwell v. Melrose, 15 Hun (N. Y.), 378.

⁴ Co. Lit. 42 a; Harmon v. Brown, 58 Ind. 207; Leonard v. Burr, 18 N. Y. 96; Warner v. Tanner, 38 Ohio St. 118.

⁵ 2 Fearn, Cont. Rem. § 36; Shaw v. Hoffman, 25 Mich. 162, 172; Miller v. Levi, 44 N. Y. 489; Pratt v. Paine, 119 Mass. 439.

creation of estates on condition is plainly apparent.¹ "Where an estate is so expressly limited by the words of its creation, that it can not endure for any longer time than until the contingency happens upon which the estate is to fail, this is a limitation."²

§ 429. **Effects of Happening of Specified Event.** — The event indicated by these expressions, when it occurs, is, as above pointed out, the occasion of the instantaneous reverting of the property to the grantor or his heirs. This is because such terms denote or define the limitation of the estate conveyed, and indicate its *natural end*. If, therefore, property be conveyed to a person while a designated tree stands, the mere falling of the tree ends the estate, because that was the event contemplated by the parties; and an estate to A and his heirs, so long as they are "tenants of the Manor of Dale," terminates naturally when they cease to be such tenants.³ So, a devise of property to a woman during her widowhood gives to her an interest which naturally terminates, either upon her re-marriage, or upon her death without having re-married.⁴

It is important to note in passing that, because the law favors an estate which shall thus end *naturally*, rather than one prematurely terminated by the breach of a condition and the re-entry by the grantor or his heirs, in cases of doubt whether or not a transfer would be in illegal restraint of marriage, it is much more likely to be held that the conveyance is valid when the restraint takes the form of a limitation. Therefore, a transfer of property to a woman during her widowhood is looked on with much more favor than a conveyance to her for her life, on condition that she shall lose it if she re-marry. In both methods of declaring the transfer, the *prima facie* nature of the gift is the same for her; but the form will be more favored by the courts when it is a limitation than when it is a condition.⁵

§ 430. **Remainders and Reversions after Estates on Limitation.** — By way of slight anticipation, it should be stated here that

¹ § 415, *supra*; Portington's Case, 10 Co. 35 a, 41 b; Henderson v. Hunter, 59 Pa. St. 335, 340; Shep. Touchst. p. * 125.

² Crabb, Real Prop § 2135, quoted in 2 Chase's Blackst. p. 294, n.

³ Prest. Est. pp. * 42-* 44, * 440; Ashley v. Warner, 11 Gray (Mass.), 43; Owen v. Field, 102 Mass. 90; First Univ. Soc. of N. Adams v. Boland, 155

Mass. 171; Leonard v. Burr, 18 N. Y. 96; Morris C. & B. Co. v. Brown, 27 N. J. L. 13.

⁴ Co. Lit. 42 a, 214 b; Mansfield v. Mansfield, 75 Me. 509; Arthur v. Cole, 56 Md. 100; Sims v. Gay, 109 Ind. 501; Scott v. Tyler, 2 Lead. Cas. Eq. (3d Amer. ed.) 412, notes.

⁵ Ibid.; § 416, *supra*.

the common-law courts would never permit a *remainder* to be so created as to curtail or prematurely end the preceding or particular estate. Therefore, if land were directly granted to A during his life, *but if* he ceased to live there, then on his moving away to pass to B and his heirs, the estate attempted to be created in favor of B could never be a remainder, because it must take effect in derogation of A's life estate. If, however, the conveyance were to A *until* he ceased to live there, or *while* he kept a good school, etc., and then to B and his heirs, B would obtain a valid remainder, because A's estate must naturally terminate when he ceased to live there, or no longer kept such a school, as the case might be.¹ This distinction will be more fully discussed hereafter in connection with remainders; but it should be carefully noted here, and remembered as an explanation of some important and far-reaching distinctions in the law of future estates.

After an estate less than fee, on limitation, there is a reversion for the grantor. Thus, if A, the owner of land in fee simple, convey it to B, so long as he remains unmarried, it will certainly revert to A, or his heirs or assigns, either when B marries, or at his death unmarried. And after a *fee*, on limitation, dependent on an event which may possibly occur, — as an estate to B and his heirs until they cease to live there, — the better view, now generally accepted, is that there exists a "possibility of reverter," — a chance that the property may return to the grantor or his heirs without the necessity for their enforcing a forfeiture. And it is also generally held, — though not so uniformly as in the case of a "possibility of forfeiture" after a fee on condition, — that such a mere chance can not be aliened or assigned.²

¹ Cruise, Dig. tit. xvii. §§ 6, 7; 4 Kent's Com. pp. *17, note (b), *262, notes (a), (b); Brattle Sq. Ch. v. Grant, 3 Gray (Mass.), 142; First Univ. Soc. of N. Adams v. Boland, 155 Mass. 171; Pemberton v. Barnes (1899), 1 Ch. 544; Slegel v. Lauer, 148 Pa. St. 236. See discussion of the meaning of the expression "possibility of reverter," § 426, notes 2, (a), *supra*; and also see, as to such a right after a fee on limitation, since the Statute of *Quia Emptores*,

Gray, Perpetuities, §§ 32-41; Hatfield v. Sneden, 54 N. Y. 280, 285.

² 1 Prest. Est. pp. *50-*53; 2 Fearn, Cont. Rem. (Smith's ed.) §§ 153, 154. Where the event which is to take the property over may occur in derogation of the first estate, as in the first illustration here given, the second estate attempted is a conditional limitation, and not a remainder; and it was always opposed and forbidden by the common-law courts. *Ibid.*; Hatfield v. Sneden, 54 N. Y. 280.

(3) *Estates on Conditional Limitation.*

§ 431. **How distinguished from Other Estates.** — The fact that a third party is to take the property, on the happening of a designated event, is the characteristic of estates on conditional limitation which distinguishes them from the other forms of qualified estates. A transfer of land to A and his heirs, but if he fail to build a house there, then to B and his heirs; or to A for his life, to leave him, however, and pass to B and his heirs, if B marry C; or to A and his heirs while a certain tree stands, and at its fall to B and his heirs, creates a form of estate, — taking the land, as it does, over to B, — which is clearly distinct from either a condition or a limitation. Upon the happening of the designated event, B becomes the owner of the property; whereas, had the estate been on limitation, then the happening of the event alone would have taken it back to the grantor or his heirs;¹ and, if it had been on condition, the happening of the event and the re-entry of the grantor or his heirs would have taken it back to them.²

Furthermore, when an estate is a conditional limitation, being made as it is to shift from the first taker to another on the happening of the designated event, the effect of the occurrence of that event and the consequent passing over of the property is the *premature termination* of the first holder's interest. This is its important feature, which, as will appear more fully in the discussion of future estates, distinguishes it from both remainders and reversions. These latter forms of future interests must always be so constituted that they shall not take effect in possession until the *natural termination* of the prior particular estates on which they depend, — the death of the first taker for life, or the expiration of the precedent estate for years, etc.; and, therefore, if succeeding estates be made such that the second taker's acquisition of the property cuts off the interest of the first, — as will be at once seen to be true of the illustrations above given, — it is a conditional limitation.³ When used in contradistinction to remainders and reversions, the term "conditional limitation" is often thought of as denoting simply the second interest, which is thus to take

¹ § 426, *supra*.

² § 422, *supra*; *Beach v. Nixon*, 9 N. Y. 35.

³ 1 *Prest. Est.* p.*91; 2 *Fearne*,

Cont. Rem. (Smith's ed.) § 149; *Cruise*, Dig. tit. xvi. ch. ii. § 16; *Smith, Exec.* Int. § 149 a.

effect in possession in derogation of the first. But its more ordinary and general use is to denote both of the interests involved.

§ 432. **Expressions used to create Estates on Conditional Limitation.** — The words by which such interests are created may be either conditional or limitational. Thus, if property be conveyed to A and his heirs *while* a certain tree stands, and then to B and his heirs, it is the same in effect as if the transfer were to A and his heirs, *but if* the tree should fall, then to B and his heirs. In either case, upon the falling of the tree, A's estate would terminate before its natural end and B's commence. These expressions, moreover, where permitted to make conditional limitations at all,¹ may be attached to estates of any quantity — for years, for life, or in fee. It is simply requisite to their existence that, by whatever form of words created, the first estate is to be *prematurely* terminated by the happening of the event, and the second interest, by the same occurrence, is to take effect in possession.²

§ 433. **Estates on Conditional Limitation are not favored by the Common Law.** — The characteristic of these estates, which was last explained in the preceding paragraph, made them objectionable to the common-law courts. When real property had been transferred to one man for a specified period, whether for years, for life, or in fee, it was thought to be both unreasonable and repugnant to the nature of the first estate that the grantor should then prescribe a means of prematurely terminating the first interest in favor of a second taker.³ This thought has been variously expressed by the courts and writers. Thus it was said: "A fee can not be limited on a fee." That is, after the grantor had conveyed a fee to A, his power over it was exhausted; and he could not, by condition or limitation, subsequently transfer the property to B.⁴ So, an interest given to A for life deprived the donor of control over the property during A's life; and he could not, by his own subsequent declaration or act, deprive A of any part of that life estate and transfer the same interest to B.⁵ It was a natural and logical conclusion of

¹ See the common-law objections to conditional limitations, explained in the following section.

² *Ibid.*; Greenl. Cruise, Dig. tit. xiii. ch. ii. § 64, note; Chase's Blackst. p. 294, note.

³ Cruise, Dig. tit. xvi. ch. ii. § 29;

Hatfield v. Sneden, 54 N. Y. 280; Brattle Sq. Ch. c. Grant, 3 Gray (Mass.), 142, 147.

⁴ Co. Lit. 271 b; 2 Blackst. Com. p. *334.

⁵ Cruise, Dig. tit. xvi. ch. ii. §§ 28-31; Carwardine v. Carwardine, 1 Eden,

the common-law tribunals that the donor, or grantor, or deviser of real property should not be allowed thus to curtail the interest which he himself had previously conveyed to another. But, as soon as alienation of real property became easily possible, owners thereof demanded that some method of thus derogating from their own grants should be invented. And it was in the process of complying with this demand that the legal profession, circumventing the objections raised by the courts, brought into being the executory interests in real property which are hereafter fully explained. They may be here briefly mentioned and defined.

§ 434. **Means of indirectly creating Conditional Limitations at Common Law.** — By resort to the system of uses and the operation of the Statute of Uses, estates on conditional limitation were first effectually produced. If, for example, a piece of land were deeded to a feoffee to uses, that he might hold the legal estate for the use of A and his heirs while they lived there, and then for the use of B and his heirs, the Statute of Uses conveyed the legal estate at once to A, and, when A ceased to live on the land, transferred it to B. This arrangement was designated a shifting use. And, previous to the modern enabling acts which deal with the conditional limitation, it was the only way in which such an interest could be brought about by deed.¹ After the Statute of Wills, 32 Hen. VIII. Ch. 1, permitted freehold estates in real property to be devised, these conditional limitations were also permitted to be made by will, and they were then designated executory devises.² Thus, in summary, with the common-law courts constantly opposing and restricting estates on conditional limitation, the require-

28, 34. And as to such limitations of estates for years, see 2 Fearn, Cont. Rem. (Smith's ed.) § 159 a; Burton, R. P. §§ 946, 947. In attempting to make directly a conditional limitation of a freehold estate — as, e. g. an estate to A for life, but if he marry B, then at once to C and his heirs — there was the further difficulty that the grantor made livery of seisin to the first taker — to A — for himself alone, and not for the other — C — since the second interest was adverse to and meant to curtail the first. Therefore, there was no livery of seisin to or for the second party, — C, — and without livery of seisin or its equi-

valent he could not acquire a freehold estate.

¹ Ch. XXXVII. *infra*.

² Ch. XXXIX. *infra*. Conditional limitations having been devised by means of shifting uses before the Statute of Uses, and it being decided that the possibility of so creating them (or any other form of devise) was done away with by that statute, it was natural and logical to construe the Statute of Wills as intended to restore the power of making these executory interests, and to allow it to be done directly in the legal estate and without resorting to any use. See p. 98, *supra*.

ments of business and commerce and the need of flexibility of property rights and interests brought about practical methods of producing estates on conditional limitation, namely, by (a) shifting uses, and (b) executory devises. Modern statutes, both in England and in the United States generally, now authorize and encourage the creation and maintenance of these estates through the operation of all forms of conveying.¹ (a) It is worthy of note, in closing this paragraph, that the efforts of jurists to overcome the courts' opposition to this particular form of future limitation have been the cause of many of the subtleties and technical distinctions which characterize those forms of future interests known as executory estates.

(a) Employing the word "remainder" in a broad, general sense, the New York Real Property Law (L. 1896, ch. 547), § 43, which was originally 1 R. S. 725, § 27, entirely obviates for that state the difficulties which existed before January 1, 1830, as to the creation and existence of estates on conditional limitation. It provides that "A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation." See *Hatfield v. Sneden*, 54 N. Y. 280; *Embury v. Sheldon*, 68 N. Y. 227; *Crooke v. County of Kings*, 97 N. Y. 421, 449.

¹ Stat. 40 & 41 Vict. ch. 33; Digby, *Hist. Law R. P.* (5th ed.) pp. 362, 382; 1 *Stim. Amer. Stat. L.* § 1426.

(4) MORTGAGES.

CHAPTER XXVI.

HISTORY, GENERAL NATURE, AND KINDS OF MORTGAGES.

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| <p>§ 435. Origin of mortgages.</p> <p>§ 436. Early forms of landed security.</p> <p>§ 437. Development of the modern mortgage.</p> <p>§ 438. Mortgage defined.</p> <p>§ 439. Distinctions between a mortgage and a conditional sale.</p> <p>§ 440. Distinctions between mortgages and other liens.</p> <p>§ 441. Classification of mortgages.</p> <p style="padding-left: 20px;"><i>a. Equitable Mortgages.</i></p> <p>§ 442. Kinds of equitable mortgages.</p> <p>§ 443. Deposit of title deeds.</p> <p>§ 444. Vendor's lien.</p> <p>§ 445. Nature of vendor's lien.</p> <p>§ 446. Transfer of vendor's lien.</p> <p>§ 447. How the vendor's lien is enforced.</p> <p>§ 448. Waiver of vendor's lien.</p> | <p>§ 449. Vendee's lien.</p> <p>§ 450. Deed absolute in form, intended as a mortgage.</p> <p>§ 451. Mortgage defective in law.</p> <p>§ 452. Valid agreement for a mortgage.</p> <p>§ 453. Charges on land.</p> <p>§ 454. <i>Lis pendens.</i></p> <p style="padding-left: 20px;"><i>b. Legal Mortgages.</i></p> <p>§ 455. Their general nature.</p> <p>§ 456. Conveyance part of mortgage.</p> <p>§ 457. The defeasance.</p> <p>§ 458. The personal obligation.</p> <p style="padding-left: 20px;"><i>Different Theories of Mortgages.</i></p> <p>§ 459. Legal and equitable theories.</p> <p>§ 460. (a) Conveyance theory.</p> <p>§ 461. (b) Lien theory.</p> <p>§ 462. (c) Combination theory.</p> |
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§ 435. **Origin of Mortgages** — Whatever may have been the germ from which has developed our modern conception of a mortgage, whether it was the Jewish land system with its year of jubilee and the return of inheritances to the original family owners, or the community system of holding realty among early Teutonic races, or the natural tendency in all peoples to use property interests as acceptable pledges for debt, certain it is that the estate on condition is the *English* progenitor of this favorite form of landed security.¹ The first Anglo-Saxon or

¹ Lit. § 332 ; Digby, Hist. Law R. P. (5th ed.) p. 285 ; Jones, Mort. § 4.

English mortgagee simply held his land on condition that the mortgagor, as we now know him, might regain it by paying back money loaned, or performing some other prescribed act.¹ It is for this reason that mortgages, though now more commonly constituting mere liens on real property than giving estates or interests therein, are most logically and intelligibly to be discussed immediately after the subject of conditional estates.

§ 436. **Early Forms of Landed Security.** — Just as all doubt that there were Anglo-Saxon *alodial* holdings and free transfers of property has disappeared, so uncertainty as to the employment of land as security for debt in those early times has practically passed away.² After the Norman conquest, however, and the imposition of feudal clogs upon conveyances of realty, deeds, both absolute and conditional, became infrequent; and it was not until after the enactment of the Statute of *Quia Emptores* that their employment became again common.³ Soon after that famous legislation began to operate, three distinct methods of using real property as security for debt appeared in English history. These were the *vivum vadium*, the *Welsh mortgage*, and the *mortuum vadium* or *mortuum gagum*.⁴

The *vivum vadium* was a transaction in which the borrower of money conveyed land to the lender to hold until the income therefrom repaid the principal and interest of the loan. It was designated a living pledge, because the proceeds of the property were thus constantly working out its redemption and restoration to its original owner. It was *living* for him, and would not pass beyond the possibility of return to him.⁵

The Welsh mortgage consisted of a conveyance of realty by the borrower to the lender, to hold and retain the proceeds, and to treat them as interest, until the borrower should repay the principal of the loan. This was often an inequitable transaction, the income being exorbitant payment of interest; and it never obtained a very wide operation.⁶

The *mortuum vadium* or *mortuum gagum* (mort-gage) re-

¹ Lit. §§ 332, 333; Kortright v. Cady, 21 N. Y. 343, 344; Erskine v. Townsend, 2 Mass. 493; Hutchins v. King, 1 Wall. (68 U. S.) 53, 57.

² 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 118; Digby, Hist. Law R. P. (5th ed.) p. 284.

³ Thomas, Mort. § 3; Powell, Mort. p. 3.

⁴ 2 Blackst. Com. p. *157; Jones, Mort. §§ 2, 3, 4.

⁵ Ibid.

⁶ Thomas, Mort. § 5; Jones, Mort. § 3.

sulted from a conveyance of real property by the borrower to the lender, to hold and manage for the joint benefit of both parties, accounting for the proceeds until a designated day, which was called the *law day*,¹ when, by the terms of the agreement, the borrower was to repay the principal and interest of the loan. It was called a mortgage, or dead pledge, because, if the law day passed without repayment by the borrower as required by his contract, the land became dead to him, his right to re-purchase it then ceased, and the lender acquired in it an absolute and indefeasible ownership.²

The last form of these ancient species of security is the only one that has survived; and its survival is due to the process of development through which it has passed and which is to be next described.

§ 437. **Development of the Modern Mortgage.** — The original mortgage, described in the preceding paragraph, was simply and only a conditional sale. The borrower deeded or otherwise transferred his land to the lender on condition that it might be bought back on the law day. If that day passed without the condition being performed, the estate and title became absolute in the lender or mortgagee. If the borrower performed the condition and redeemed his land on the law day, the title had to be returned to him by a reconveyance from the lender.³ This system frequently resulted in great hardship for the mortgagor, who, if accidentally unable to repurchase his land on the law day, might lose a very valuable property for a comparatively small sum which he had borrowed. What may be termed the evolution of our modern mortgage from this system was the natural result of the frequent occurrence of such hardship. There are five prominent steps or changes in that evolution.

First. Requirement of Reconveyance abolished. — The form of the mortgage was such that, by simply following its *prima facie* meaning, the courts of law, soon after the instrument was generally used as a security, dispensed with the requirement that the mortgagee should reconvey to the mortgagor upon payment

¹ Kortright v. Cady, 21 N. Y. 343, 345. It was sometimes made, also, without a day for payment being fixed. Then, on proper application, the court might determine the day; and such proceedings are undoubtedly the forerunner of the strict foreclosure, here-

after explained. 2 Poll. & Mait. Hist. Eng. L. (2d ed.) pp. 119, 120.

² Ibid.; 2 Blackst. Com. p. *158; Thomas, Mort. § 6; 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 119, note 3.

³ Erskine v. Townsend, 2 Mass. 493; 2 Wash. R. P. (6th ed.) § 976; Jones, Mort. § 1.

of the debt. The document itself provided that, if the terms of the condition were fulfilled, i. e., if the loan were repaid or the other specified obligation performed, the conveyance should become null and void. It was a natural step for a court of law to take when it decided that this provision should be strictly observed, and that, the obligation being performed, the transaction was to be treated as if no conveyance at all had ever been made to the mortgagee.¹

Second. Equity of Redemption. — The next act in the development of the mortgage was the very important one which, most of all, has helped to make that form of security the readily available property interest which is so beneficial at the present time to business and commerce. It was the addition of the so-called "equity of redemption." The courts of equity, organized and energetically acting to lessen the severities of the common-law principles and procedure, found one of the most emphatic needs for such relief in the condition of mortgagors, whose lands might be forfeited because they were unable to redeem them on the law day. Those courts, accordingly, gave to such obligors the right, after that day had passed, to pay back the loan with all accumulations of interest and costs, or otherwise to fulfil their obligations, and thereupon to regain the title to and possession of the mortgaged lands.² This right or *equity of redemption* has proved to be a great and beneficial addition to the ancient character of a mortgage. It began to be recognized and allowed some time during the reign of Elizabeth, and by the middle of the seventeenth century was thoroughly settled as a right of the mortgagor, inalienable by him in the transaction of making the mortgage.³ As will be more fully explained hereafter, a mortgage can not now exist divorced from this right.⁴ And this salient feature of the law of mortgages is couched in the maxim "Once a mortgage, always a mortgage."⁵

The equity of redemption, being in its original a mere right to redeem after the law day, expressed so closely the property

¹ Lit. §§ 332, 337; Jones, Mort. § 4; Merritt v. Lambert, 7 Paige (N. Y.), 344, 348; Shields v. Lozear, 34 N. J. L. 496, 502.

² Emanuel College v. Evans, 1 Ref. in Chan. 18; Bispham's Prin. Eq. § 150; Thomas, Mort. § 8.

³ Emanuel College v. Evans, 1 Ref.

in Chan. 10; Thomas, Mort. § 8; Jones, Mort. § 7.

⁴ § 491, *infra*.

⁵ Newcomb v. Bonham, 1 Vern. 8; Moakes & Co. v. Rice (1902), App. Cas. 24; Jarrah T. & W. P. Corp. v. Samuel (1903), 2 Ch. 1; Hughes v. Harlan, 166 U. S. 427; Bailey v. Bailey, 71 Mass. 505; § 491, *infra*.

interest which remained in the mortgagor, that it gradually came to be employed to denote, also, that interest. And to-day it is very commonly used to indicate the value of the real property to its owner, over and above what he would have to pay to redeem it from the lien of the mortgage.¹ It was natural that, as the meaning of the expression was thus enlarged, the court that so dealt with it should decide that an equity of redemption was not only a right, but also an *equitable estate* in the land. This conception of it was thoroughly settled by Lord Harwicke in the case of *Casborne v. Scarfe*, decided in the year 1736.² It is to be added that, after these principles, rights, and interests had been thus settled and long acted on by equity, the courts of law came gradually to recognize and enforce them; and the result is that now the "equity of redemption," as including both the mortgagor's right to redeem after the law day and the value of that right to him, has substantially the same meaning and operation in all courts.³ In many of the United States, also, as will be more completely explained hereafter,⁴ the mortgagor now retains the legal title to the land, while the mortgagee has only a lien; and yet the mortgagor's interest is still designated his "equity of redemption." Thus used, the term is, of course, a misnomer. But it is very conveniently and popularly employed, in this general sense, to embrace all the rights and interest of the mortgagor during the continuance of the mortgage lien.

Third. Time Limit placed on Equity of Redemption.—While the meaning of the expression "equity of redemption" was as yet restricted so as to embrace only the right of the mortgagor to redeem after the law day, it became apparent that such right ought not to be indefinitely extended, even though the borrower continued to pay interest on the loan. The lender might want his money, to which he was entitled on the law day by virtue of his contract; and the mere accruing of interest might come far short of compensating him for his inability to recover the principal. Therefore, reasoning by analogy from the Statute of Limitations, the next step, taken by the courts of equity, was the limitation of the time of the equity of redemption to twenty years after the law day.⁵

¹ See *Tice v. Annin*, 2 Johns. Ch. (N. Y.) 125; *Baker v. Georgi*, 10 N. Y. App. Div. 249, 252; *Thomas, Mort.* § 30; *Boone, Mort.* §§ 96, 98.

² 1 Atk. 603. See § 413, *supra*.

³ *Odell v. Montross*, 68 N. Y. 499, 503; *Bispham's Prin. Eq.* § 151.

⁴ § 461, *infra*.

⁵ *Anon.*, 3 Atk. 313; *Slicer v. Bank of Pittsburg*, 16 How. (57 U. S.) 571;

Fourth. Right to foreclose. — But it would frequently happen, of course, that the mortgagee needed and should have repayment of the loan long before the expiration of twenty years after it became due. In other words, the efforts of equity to ameliorate the hardship, which had often deprived the mortgagor of his land after the law day, had resulted in giving him too great an advantage over the mortgagee. He could hold the money, by simply paying legal interest thereon, for twenty years after the time when, by the terms of his contract, he was under a duty, both legal and moral, to repay the principal. Accordingly, the courts of equity compensated the mortgagee by conferring upon him the right to *foreclose* the mortgage after the law day.¹ This word “foreclose” is taken from the last part of the decree in the earliest form of such a suit. The language there employed was that, if the mortgagor did not redeem the property by paying off the mortgage and all accrued interest and costs within a designated time, — usually six months, — he should be “forever barred and foreclosed” of his equity of redemption.² Therefore, the proceeding came to be designated a “foreclosure suit.”

Fifth. Changes and Improvements in Foreclosure. — The last stage, or series of steps, in the evolution of the modern mortgage has consisted of the improvements in foreclosure proceedings. These are explained in detail in the chapter hereafter devoted to such suits.³ And it will be sufficient here to state that, whereas the original form of foreclosure resulted in transferring to the mortgagee the absolute and indefeasible legal title and estate in the mortgaged property, such a suit at the present time ordinarily terminates in a judicial sale of the land, payment of the mortgage debt out of the proceeds, and restitution of the surplus, if any, to the mortgagor or his successors in interest.⁴

§ 438. *Mortgage defined.* — In view of its development from a conditional sale of land, as above explained, two different

Demarest v. Wynkoop, 3 Johns. Ch. (N. Y.) 129; Miner v. Beekman, 50 N. Y. 337; Ayres v. Waite, 10 Cush. (Mass.) 72; Bates v. Conrow, 11 N. J. Eq. 137.

¹ Monday v. Monday, 1 Ves. & Bea. 223; Lansing v. Goelet, 9 Cowen (N. Y.), 326; Moulton v. Cornish, 138 N. Y. 133, 140; 4 Kent's Com. p. *181; Thomas, Mort. § 677.

² Ibid.; Lees v. Fisher, L. R. 22 Ch. Div. 283.

³ Ch. XXIX. *infra*.

⁴ Wallack v. Galton, 3 P. Wms. 352; Bolles v. Duff, 43 N. Y. 469; Moulton v. Cornish, 138 N. Y. 133, 140; Bartlett v. Sanborn, 64 N. H. 70; Farrell v. Parlier, 50 Ill. 274; §§ 557, 558, *infra*.

definitions of a mortgage may be now appreciated. One of these, which savors more of the ancient theory, is that it is "a conveyance absolute in form, but intended to secure the performance of some act (such as the payment of money and the like) by the grantor or some other person, and to become void, if the act is performed agreeably to the terms prescribed at the time of making such conveyance."¹ The other definition, which draws more fully from the modern conception of the mortgage transaction, is that it is "any conveyance of land intended by the parties at the time of making it, to be a security for the payment of money or the doing of some prescribed act."² The thought of a mortgage as in form a conveyance of real property, but resulting ordinarily in the transfer of nothing more than a lien thereon, such lien to be held as security for the repayment of money loaned or the doing of some other prescribed act, is that most commonly in the mind of the modern court in dealing with these transactions.

§ 439. **Distinctions between Mortgage and Conditional Sale.** — Beginning in feudal times as a technical sale on condition with a forfeiture certain to result if the prescribed event did not occur on the designated day, and, by the above-explained changes, growing into a mere security for debt, which in most jurisdictions is now only a lien on the land, the modern mortgage is something radically different from its common-law ancestor. The sale of real property, however, on condition subsequent that the vendor may within a stipulated time repurchase the property for a sum agreed upon, has not ceased to be a possibility in the law, and is sometimes found as an actual occurrence.³ It is not favored by the courts. And when a transaction takes such a form as this, while each case must depend on its own circumstances, yet the inclination of the courts is to hold it to be a mortgage, and thereby to secure for the borrower the equity of redemption after the law day.⁴ But, if the parties make their meaning clear and enter

¹ 2 Wash. R. P. (6th ed.) p. 31, p. *475.

² Ibid.; *Burnett v. Wright*, 135 N. Y. 543, 547.

³ *Davis v. Thomas*, 1 Russ. & M. 506; *Conway v. Alexander*, 7 Cranch (11 U. S.), 218; *Bogk v. Gassert*, 149 U. S. 17, 27; *Wallace v. Johnstone*, 129 U. S. 58; *Fullerton v. McCurdy*, 55 N. Y. 637; *Pitts v. Maier*, 115 Ga. 281.

⁴ *King v. Newman*, 2 Munf. (Va.) 40; *Mooney v. Byrne*, 163 N. Y. 86; *Shields v. Russell*, 142 N. Y. 290; *Eaton v. Green*, 22 Pick. (Mass.) 526; *Lounsbury v. Norton*, 59 Conn. 178; *Baughner v. Merryman*, 32 Md. 185. But some courts lean the other way. And often the question is one of fact for the jury. See *Bogk v. Gassert*, 149 U. S. 17, 27; *Thomas, Mort.* § 38.

into a contract of conditional sale, such as is above described, which is fair and reasonable, their agreement will be upheld; and, if the vendor then fail to redeem on or before the law day, his right to do so is forever gone.¹

While ordinarily preferring a mortgage rather than a conditional sale, because the former involves an equity of redemption while the latter does not, courts have agreed on several important *criteria* for determining to which of these forms a transaction belongs. One test involves the inquiry whether or not the so-called vendor has obtained for his property money or other value which he is *obligated to repay*. When it is reasonably clear that he is bound to repay the purchase-money, the transaction is only a loan, by whatever name it may be called by the parties; and the dealing with the land constitutes a mortgage.² Another important question is as to the *possession* of the property involved. If this pass to the vendee, that fact is, to some extent, evidence that the transaction is a conditional sale; while, if the so-called vendor retain possession, it is usually a mortgage.³ Again, the amount of *consideration* paid is an important element in helping to decide this question. If the vendee pay substantially all that the property is worth, he may more easily assume the position of a conditional purchaser than he can if he pay much less than such value.⁴ Still another *criterion* arises from the way in which the parties may have dealt with their securities. If, for example, when the transfer occurred, the vendee delivered up collateral security which he was holding and which belonged to the vendor, this indicates that the land was meant to take the place of such collateral, and the transaction is clearly a mortgage.⁵ In summary, it may be said that, with the strong determination not to allow a borrower to divest himself of his equity of redemption by giving the transaction the form of a conditional sale,

¹ Last two preceding notes.

² *Mooney v. Byrne*, 163 N. Y. 86; *Matthews v. Sheehan*, 69 N. Y. 585; *Pace v. Bartles*, 47 N. J. Eq. 170, 175; *Blumberg v. Beekman*, 121 Mich. 647; *Carroll v. Tomlinson*, 192 Ill. 398; *Wolf v. Theresa Village Fire Ins. Co.*, 115 Wis. 402.

³ *Blumberg v. Beekman*, 121 Mich. 647; *Pace v. Bartles*, 47 N. J. Eq. 170, 175; *Waters v. Randall*, 47 Mass. 479; *Simpson v. First Nat. Bk.*, 93 Fed. Rep. 309; *Bispham's Prin. Eq.* § 154.

⁴ *Mooney v. Byrne*, 163 N. Y. 86; *Campbell v. Dearborn*, 109 Mass. 130; *Wharf v. Howell*, 5 Binney (Pa.), 499; *Hawes v. Williams*, 92 Me. 483; *Bobb v. Wolff*, 148 Mo. 335; *Osgood v. Osgood*, 35 Oreg. 1; *Simpson v. First Nat. Bk.*, 93 Fed. Rep. 309.

⁵ *Bispham's Prin. Eq.*, § 154, citing *Haines v. Thomson*, 70 Pa. St. 434, and note in 11 Amer. Law Reg. n. s. 680. And see *Susman v. Whyard*, 149 N. Y. 127.

the courts, especially with the above-mentioned *criteria* in mind, carefully scrutinize every element of the transfer of the property to ascertain whether or not a loan was really intended and made; and, unless it is clear that no loan was meant to be made and that none ought to be inferred, they hold the contract to be a mortgage. When it is manifest, however, from all the circumstances, that no loan was intended, but that the vendor was simply given the right to repurchase the property for the original purchase price or other stipulated sum, and the transaction is otherwise fair, they declare it to be a conditional sale and hold the vendor strictly to the terms of his agreement.¹ And, when any controversy as to the facts exists, the question is for the jury.²

§ 440. **Distinctions between Mortgages and other Liens.** — The mortgage, evolved as above explained from the conditional sale, but now being in most jurisdictions a mere lien, is distinguished chiefly by its history from other liens. The other liens on realty, as hereafter explained, are statutory in their origin and operation.³ It is to be understood, therefore, that the word "mortgage," as here employed and as ordinarily used by courts and writers, includes those interests, liens, and rights, whether recognized in law or in equity, which have grown up from common-law principles, and have associated with them the "equity of redemption."

§ 441. **Classification of Mortgages.** — The primary division of all mortgages is into *a. equitable* and *b. legal*. They are all recognized and enforceable in courts of equity; but some of them are not known to the law courts. This classification means, therefore, that legal mortgages are such that both law and equity will take cognizance of them, while equitable mortgages are such as do not arise from conveyances by the mortgagors and are cognizable in courts of equity only.⁴ The equitable mortgages are sometimes spoken of and treated under the distinct heading of "equitable liens."⁵ But their origin and

¹ Last six preceding notes. Also *Perdue v. Bell*, 83 Ala. 396; *Flegg v. Mann*, 14 Pick. (Mass.) 467; *Hoopes v. Bailey*, 28 Miss. 328; *Cornell v. Hall*, 22 Mich. 377.

² *Bogk v. Gassert*, 149 U. S. 17, 27; *Thomas, Mort.* § 38; *Bispham's Prin. Eq.* § 154.

³ Such are mechanics' liens, unsafe building liens, liens for taxes, assessments and water rents, attachment liens,

judgment liens, etc. N. Y. L. 1897, ch. 418; N. Y. Code Civ. Pro. § 1251; *Gerard on Titles to R. E.* ch. 47, 48; 1 *Stim. Amer. Stat. L.* §§ 1950, 1960-1986, 350-353.

⁴ *Thomas, Mort.* § 41; *Jones, Mort.* § 162.

⁵ *Jones, Liens*, §§ 77, 1061; *Pom. Eq. Jur.* §§ 165-167; *Bispham's Prin. Eq. ch.* 7.

history are so thoroughly bound up with those of all other forms of mortgages that it is most logical and convenient to treat of them as is here done. They will be first described and explained, in so far as it is necessary to comprehend them as distinct from the ordinary legal mortgages.

a. Equitable Mortgages.

§ 442. **Kinds of Equitable Mortgages.** — The chief species of claims against real property, which belong within the class of mortgages called equitable, are, — mortgages arising from deposit of title deeds, vendors' liens, vendees' liens, absolute deeds intended and construed as mortgages, written mortgages defective in law, valid parol agreements for mortgages, charges on land by wills and other instruments, and liens arising from the doctrine of *lis pendens* or its statutory substitute. Each of these requires a brief, separate discussion.

§ 443. **Deposit of Title Deeds.** — In most sections of England, the title deeds of real property are not recorded, but are preserved and held by the owner. In selling or encumbering the land, they are produced and examined by the vendee or lender, and in case of a sale are handed over to him. The owner of land can not ordinarily sell it or borrow money upon it if he fail to produce these in such order as to show a perfect title. The deposit of one or more of them with him who loans money upon the faith of the land gives to him, therefore, substantial security. Such a transaction has uniformly been held in England to create for him an equitable mortgage upon the property, which he can foreclose or deal with ordinarily in equity in substantially as useful a way as though he held a written and sealed legal mortgage.¹

The theory of equitable mortgages arising from deposit of title deeds has been recognized in this country, and several instances of its application exist in the cases.² But the recording acts, which dispense with the necessity for retaining the

¹ *Russel v. Russel*, 1 Bro. C. C. 269; *Edge v. Worthington*, 1 Cox, Ch. 211; *Northern Co. Ins. Co. v. Whipp*, L. R. 26 Ch. Div. 482. "It has been held not to be an invasion of the Statute of Frauds, and the English courts of equity have sustained the right of the lender to retain the deeds until the loan was repaid,

and have enforced the lien by a sale of the land." *Thomas*, Mort. § 42.

² *Carey v. Rawson*, 8 Mass. 159; *Rockwell v. Hobby*, 2 Sand. Ch. (N. Y.) 9; *Gale v. Morris*, 29 N. J. Eq. 222; *Hackett v. Reynolds*, 4 R. I. 512; *Woodruff v. Adair*, 131 Ala. 530.

original deeds and make proper record of them notice (if not also the spirit of American dealing with land titles), have caused this kind of security to become practically obsolete in most of the states of this country.¹

§ 444. **Vendor's Lien.** — The ordinary and advisable method, by which a vendor of real property who is not paid the purchase price in full secures the amount unpaid, is by a legal purchase money mortgage, formally executed, delivered, and recorded.² But, when this is not done, he may either directly stipulate for an interest in the property conveyed, or rely on the lien which the Court of Equity accords to him in the absence of any such stipulation. Thus, the vendor's lien, so called, may be the outcome of express or implied understanding between the parties to the conveyance; and when it exists it is most frequently the result of equitable construction in favor of the vendor.³

§ 445. **Nature of Vendor's Lien.** — This lien is a pure equity, invented and fostered for the purpose of enabling unpaid vendors to retain just and equitable rights against the land. In England and most of the United States, it is favored as a form of equitable mortgage.⁴ In a few jurisdictions, such as Massachusetts, Maine, Pennsylvania, and the Carolinas, the courts have manifested a dislike to it, and refuse to raise it by any implication of equity.⁵ Being created and existing in favor of the unpaid or partly unpaid vendor, it is, wherever recog-

¹ Stoddard v. Hart, 23 N. Y. 556, 561; Bowers v. Johnson, 49 N. Y. 432; Hall v. McDuff, 24 Me. 311; Gardner v. McClure, 6 Minn. 250. And in some states they have been expressly repudiated. Edwards v. Trumbull, 50 Pa. St. 509; English v. McClure, 62 Ga. 413; Davis v. Davis, 88 Ga. 191; note to Russel v. Russel, 1 Lead. Cas. Eq. (4th Amer. ed.) p. 931, *et seq.*

² Boies v. Benham, 127 N. Y. 620, 624; Commonwealth Title Ins. Co. v. Ellis, 192 Pa. St. 321; Palmer v. Des Couriers, 19 R. I. 501; Baker v. Updike, 155 Ill. 54; Fields v. Dremen, 115 Ala. 558.

³ Mackreth v. Symmons, 15 Ves. 329; Davies v. Thomas (1900), 2 Ch. 462; Slide & Spur Gold Mines v. Seymour, 153 U. S. 509; Seymour v. McKinstry, 106 N. Y. 230; Wilson v.

Lyon, 51 Ill. 166; Jones v. Rush, 156 Mo. 364; Smith v. Hiles-Carver, 107 Ala. 272.

⁴ Chapman v. Tanner, 1 Vern. 267; Davies v. Thomas (1900), 2 Ch. 442; Slide & Spur Gold Mines v. Seymour, 153 U. S. 509; Hubbell v. Hendrickson, 175 N. Y. 175; Corlies v. Howland, 26 N. J. Eq. 300; Lewis v. Shearer, 189 Ill. 184; Bispham's Prin. Eq. § 353; 1 Perry on Trusts, § 237.

⁵ Ahrend v. Odiorne, 118 Mass 261; Philbrook v. Delano, 29 Me. 40; Heister v. Green, 48 Pa. St. 96; Wynne v. Alston, 1 Dev. Eq. (N. C.) 163; Wragg v. Comptroller-Gen., 2 Desaus (S. C.), 509; Greeno v. Barnard, 18 Kan. 518. And in a few states, such as Vermont and Virginia, this lien has been abolished by statute. See Bispham's Prin. Eq. § 353.

nized, a strong and important right which takes precedence of the interest of the vendee and his wife's or widow's claim of dower, and the rights of his heirs and devisees, and of all other persons claiming from or through him, except such as acquire some interest or title innocently, for value, and without notice of the lien.¹

§ 446. **Transfer of Vendor's Lien.** — In its original, inherent nature, this lien, as raised simply by equity, was held to be unassignable. It has generally been treated as a right purely personal to the vendor — a right which might pass from him by descent, or be released to the owner of the land, but could not be transferred by assignment.² This restriction, however, has never been held to apply to such a lien directly stipulated for in the deed or conveyance or by other contract.³ And, by virtue of the freedom given by modern statutes in assigning claims and rights of action, the vendor's lien of either form may now be transferred by direct agreement.⁴ It is still held, however, in many states, that the assignment merely of the debt which it secures, without mentioning the lien, will not pass the latter, unless it is necessary that it should be included in order adequately to protect the rights of the assignor.⁵

§ 447. **How the Vendor's Lien is enforced.** — Being in its essence a mortgage, this lien may be foreclosed in equity in substantially the same manner as a legal mortgage.⁶ After foreclosure is commenced, the filing of a notice of pendency of action is the method, under modern statutes, by which notice of the existence of the lien is given to all subsequent purchasers and encumbrancers of the land.⁷ Since the lien is

¹ *Hubbell v. Hendrickson*, 175 N. Y. 175; *Acton v. Waddington*, 46 N. J. Eq. 16; *Sarter v. Clarkson*, 156 Ind. 316; *Miller v. Albright*, 60 Ohio St. 48; *Beal v. Harrington*, 116 Ill. 113; *Koch v. Roth*, 150 Ill. 212; *Pylant v. Reeves*, 53 Ala. 132; *Dance v. Dance*, 56 Md. 433; *Lewis v. Henderson*, 22 Oreg. 548; *Jones, Mort.* § 193; 1 *Perry on Trusts*, § 237 *et seq.*

² *Robinson v. Appleton*, 124 Ill. 276; *Heith v. Horner*, 32 Ill. 524; *White v. Williams*, 1 Paige (N. Y.), 502; *Baum v. Grigsby*, 21 Cal. 172; *Pitts v. Parker*, 44 Miss. 247; *Thomas, Mort.* § 58.

³ And in such cases an assignment of the debt carries the lien, unless it is expressly reserved. *Payne v. Wilson*, 74 N. Y. 348, 354; *Gordon v. Johnson*, 186

Ill. 18; *McClintic v. Wise*, 25 Gratt. (Va.) 448; *Dingley v. Bank of Ventura*, 56 Cal. 467.

⁴ *Hallock v. Smith*, 3 Barb. (N. Y.) 267; *Smith v. Smith*, 9 Abb. Pr. n. s. (N. Y.) 420; *Payne v. Wilson*, 74 N. Y. 348; *Sloan v. Campbell*, 71 Mo. 387; *Grigsby v. Hair*, 25 Ala. 327.

⁵ *Chapman v. Laggett*, 41 Ark. 292; *Louisiana Nat. Bank v. Knapp*, 61 Miss. 490; *Thomas, Mort.* § 58.

⁶ *Dubois v. Hull*, 43 Barb. (N. Y.) 26; *Willets v. Brown*, 42 Hun (N. Y.), 140; *Graves v. Contant*, 31 N. J. Eq. 763; *Chapman v. Lee*, 64 Ala. 483.

⁷ *Mills v. Bliss*, 55 N. Y. 139; *Pennington v. Martin*, 146 Ind. 635; *Erickson v. Smith*, 79 Iowa, 374.

only an equity which can not ordinarily be recorded, this is the one feasible method of preventing the vendee from cutting off the lien by selling the land to an innocent purchaser for value and without notice of the lienor's rights.

§ 448. **Waiver of Vendor's Lien.** — In most states, as above explained, the fact that the vendor of real property is not paid in full raises a strong presumption that he meant to retain this form of equitable mortgage as security. And a court of equity will treat him as so retaining it, unless he affirmatively does some act to indicate an intent to waive the same.¹ Such intent is ordinarily indicated by express declaration on his part, or by his acceptance of other security. Thus, if he take a mortgage on other land for the amount of the unpaid purchase money, or accept stocks or corporate bonds or other personalty as collateral security, or receive the note of a third party endorsed or transferred to him by the vendee, or usually the vendee's own note taken upon the faith of the endorsement of some other person or persons, he is deemed to have waived the lien unless he does something clearly indicative of a contrary intent.² But his acceptance of the vendee's own note, unendorsed by any one else, and otherwise unsecured, is not ordinarily regarded as indicating any intention of relinquishing the equity,³ unless it is clearly shown to have been received *as payment*.⁴ The principle here recognized by the best courts is that, if he receive something in itself valuable as property, and so distinguished from the mere promise of the vendee, he shall be treated as waiving the lien if he fail expressly to indicate the contrary intention.⁵ He may, of course, receive any

¹ *Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509; *Hubbell v. Hendrickson*, 175 N. Y. 175; *Dunton v. Outhouse*, 64 Mich. 419; *Wilson v. Lyon*, 51 Ill. 166; *Thomas, Mort.* § 60.

² *Nairn v. Prowse*, 6 Ves. 752; *Vail v. Foster*, 4 N. Y. 312; *Gaylord v. Knapp*, 15 Hun (N. Y.), 87; *Baker v. Updike*, 155 Ill. 54; *Blomstrom v. Dux*, 175 Ill. 435; *Lord v. Wilcox*, 99 Ind. 491; *Donegan v. Mentz*, 70 Ala. 437; 4 Kent's Com. p. * 153. *Contra*, *Wasson v. Davis*, 34 Texas, 159; *Boss v. Ewing*, 17 Ohio, 521.

³ *Maroney v. Boyle*, 141 N. Y. 462; *Acton v. Waddington*, 46 N. J. Eq. 16; *Kent v. Gerhard*, 12 R. I. 92; *Scott v. Edgar*, 63 N. E. Rep. (Ill.) 452; *Baum*

v. Grigsby, 12 Cal. 172; *Thomas, Mort.* § 61.

⁴ "Where, however, the bill or note is taken as *payment* of the consideration-money, in other words, where the security was in fact the thing bargained for, the lien is gone." *Bispham's Prin. Eq.* § 355, citing *Buckland v. Pocknell*, 13 Sim. 406, etc. This is more apt to be the result in such states as Massachusetts, Maine, and Vermont, where *prima facie* a note or bill received for a debt is taken in payment. See *Butts v. Dean*, 2 Met. (Mass.) 76; *Dodge v. Emerson*, 131 Mass. 467; *Bunker v. Barron*, 79 Me. 62; *Bennett's Benj Sales* (7th. ed.), pp. 773-775.

⁵ Last two preceding notes; *Fish v.*

amount of other property as security and still retain the lien, if he show clearly that this is his design.¹

§ 449. **Vendee's Lien.** — When one has contracted to purchase real property, and has paid a portion of the purchase price before receiving his conveyance, he is treated in equity as having a lien on the realty for the amount so advanced. This is the correlative of the vendor's lien, and another form of equitable mortgage.² The plain, fundamental principle in both of these forms of security is that he who has not the title to land, but *ex æquo et bono* should be secured by it for money advanced by him or due to him upon the faith thereof, is to be treated in equity the same as if he held a valid legal mortgage on the property.³

The vendee who has this form of mortgage may give notice of its existence, after default by the other party, by beginning to foreclose it and filing a notice of pendency of action according to the requirements of the modern statutes; or, holding as he ordinarily does a written contract for the purchase of the land, he may, in most states, have such contract recorded. While, however, in many states, such as New York, Michigan, and Minnesota, a contract for the purchase of land may be recorded,⁴ such record does not ordinarily constitute constructive notice.⁵ (a) But, being spread out on the records, the contract becomes actual notice to all examiners of title who

(a) The New York statute declares that, "An executory contract for the sale or purchase of real property, or an instrument containing a power to convey real property, as the agent or attorney for the owner of the property, acknowledged or proved, and certified, in the manner to entitle a conveyance to be recorded, may be recorded by the recording officer of any county in which any of the real property to which it relates is situated." Real Prop. L. § 244, originally 1 R. S. 762, § 39. And the method of acknowledging or proving the instrument, to entitle it to be recorded, is prescribed by §§ 248-264 of the Real Property Law. But, whereas § 241 of the same law makes record of *conveyances* constructive notice to subsequent purchasers and encumbrancers, there is no such provision as to these executory contracts. And it has been distinctly held that although their record

Howland, 1 Paige (N. Y.), 20; Acton v. Waddington, 46 N. J. Eq. 16; Moshier v. Meek, 80 Ill. 79; Thames v. Caldwell, 60 Ala. 644.

¹ Lord v. Wilcox, 99 Ind. 491.

² Burgess v. Wheate, 1 Wm. Blackst. 123; Ross v. Watson, 10 H. L. Cas. 672; Chase v. Peck, 21 N. Y. 581; Craft

v. Latourette, 62 N. J. Eq. 206; Stults v. Brown, 112 Ind. 370; Thomas, Mort. § 64.

³ Ibid.

⁴ N. Y. L. 1896, ch. 547, § 244; 1 Stim. Amer. Stat. L. §§ 1551, 1624.

⁵ Washburn v. Burnham, 63 N. Y. 132.

find it; and therefore such proceeding is practically quite good, though not wholly adequate, security.¹

§ 450. **Deed Absolute in Form, intended as Mortgage.** — When the borrower of money is induced by the lender to secure the loan by an absolute deed of land, it being understood, expressly or tacitly, that the vendee will reconvey the property on being repaid, the transaction constitutes in equity a mortgage. And this fact may be proved by oral testimony, or by any other form of competent evidence which is clear and convincing.² This form of equitable mortgage is one of the oldest. It was early found by the courts of equity that they must treat this transaction as a mortgage, whenever it was in substance a loan, in order to prevent the destruction of the equity of redemption by the simple device of making the instrument in the form of an absolute deed.³ (a)

The reverse proposition, however, has never been accepted by any court; that is, when the instrument is on its face a mortgage, extraneous evidence that it was intended to be a deed will not be received.⁴ To show by extraneous evidence that a deed in form is a mortgage is simply to add a defeasance. But the attempt to prove by parol that a mortgage in form was meant to be a deed, would be to endeavor to vary a valid written instrument by extraneous evidence.⁵

The fact, moreover, that a deed of conveyance is made as a method of paying a debt to the grantor does not constitute the transaction a mortgage.⁶ Thus, when land is conveyed by

may be read in evidence, it does not afford any constructive notice, but only actual notice to those who in fact find them on the records. *Boyd v. Schlesinger*, 59 N. Y. 301, 309; *Washburn v. Burnham*, 63 N. Y. 132.

(a) For the New York statute, codifying the law as here stated, see § 457, note (a), *infra*.

¹ *Bank for Savings v. Frank*, 45 N. Y. Super. Ct. (J. & S.) 404; *Merithew v. Andrews*, 44 Barb. (N. Y.) 201; *Boyd v. Schlesinger*, 59 N. Y. 301.

² *Macaulay v. Smith*, 132 N. Y. 524; *Blazy v. McLean*, 129 N. Y. 44; *Cullen v. Carey*, 146 Mass. 50; *Herrick v. Teachout*, 74 Vt. 196; *Beckett v. Allison*, 188 Pa. St. 279; *Moran v. Munhall*, 204 Pa. St. 242; *Sibley v. Ross*, 88 Mich. 315; *Locke v. Moulton*, 96 Cal. 21; *Fuller v. Jenkins*, 130 N. C. 554; *Reeves v. Abercrombie*, 108 Ala. 535.

³ *Sevier v. Greenway*, 19 Ves. 413; *Burnett v. Wright*, 135 N. Y. 543;

Steel v. Steel, 86 Mass. 417; *Ahern v. McCarthy*, 107 Cal. 382; § 450, *infra*.

⁴ *Wing v. Cooper*, 37 Vt. 169; *Brown v. Nickle*, 6 Pa. St. 390; *Ball v. Shafter*, 26 Hun, 353, *aff'd*, 98 N. Y. 622; *Brownson v. Henry*, 140 Ind. 455.

⁵ *Ibid.*; *Thomas v. Scutt*, 127 N. Y. 133; *Emmett v. Penoyer*, 151 N. Y. 564; *Johnson v. Prosperity Loan Ass'n*, 94 Ill. App. 260.

⁶ *Wilson v. Parshall*, 129 N. Y. 223; *Walsh v. Breman*, 52 Ill. 193; *Hall v. Linn*, 8 Colo. 264; *In re Miller's Estate*, 26 Pittsb. Leg. J. (n. s.) 344.

such an instrument, under a parol agreement that the vendee will sell the property, and, after deducting from the proceeds the amount of a debt owed him by the vendor, will pay over the residue to the latter, the transaction does not result in a mortgage, but rather in a conveyance of property in trust. The purchaser has the title to the property, and can compel specific performance against one to whom he has contracted to sell the same.¹

§ 451. **Mortgage Defective in Law.** — When the parties have made and delivered for the loan an instrument which, because of informality or improper execution or otherwise, can not operate as a legal mortgage, equity treats the transaction as in effect the same as if the document had been valid and operative.² This it does in pursuance of the maxim that “equity treats that as done which ought to be done.” The lender may either have the instrument reformed by equity, and thus made a valid legal mortgage, or, after the maturity of the debt, he may enforce it in that court by foreclosure, without reformation.³

§ 452. **Valid, Parol Agreement for a Mortgage.** — On the same principle as that explained in the last paragraph, “where one party advances money to another upon the faith of a verbal agreement by the latter to secure its payment by a mortgage upon certain lands, but which is never executed, . . . equity will impress upon the land intended to be mortgaged a lien in favor of the creditor who advanced the money for the security and satisfaction of his debt. This lien attaches upon the payment of the money, and, unless there is a waiver of it, express or implied, remains, and may be enforced as long as the debt itself may be enforced.”⁴ And the proper procedure for its enforcement is by its foreclosure as an equitable mortgage.⁵

¹ *Wilson v. Parshall*, 129 N. Y. 223; *Jacobs v. Morrison*, 136 N. Y. 101.

² *Payne v. Wilson*, 74 N. Y. 348; *Hamilton Trust Co. v. Clernes*, 163 N. Y. 423; *Gale's Ex'rs v. Morris*, 29 N. J. Eq. 222; *Westerly Sav. Bk. v. Stillman Mfg. Co.*, 16 R. I. 497; *Morrill v. Morrill*, 53 Vt. 74; *Harrington v. Fortner*, 58 Mo. 468.

³ *Remington v. Higgins*, 54 Cal. 620; *Spragne v. Cochran*, 144 N. Y. 104; *Gale's Ex'rs v. Morris*, 29 N. J. Eq. 222; *Tiernan v. Poor*, 1 Gill & J. (Md.) 216.

⁴ *Spragne v. Cochran*, 144 N. Y. 104, 112.

⁵ It is not the oral agreement alone that creates an equitable mortgage, for it is within the Statute of Frauds. But when it is accompanied or followed by performance, as the actual handing over of money, this takes the case out of the statute, and an equitable mortgage emerges to prevent fraud. *Ibid.*; *People v. Woodruff*, 75 N. Y. App. Div. 90; *Whitney v. Foster*, 117 Mich. 643; *Carter v. Holmon*, 60 Mo. 498; *Remington v. Higgins*, 54 Cal. 620; *Bridgeport E. & I. Co. v. Meader*, 72 Fed. Rep. 115; *Thomas, Mort.* § 51.

§ 453. **Charges on Land.** — Since, at common law, a decedent's real property could not ordinarily be reached by his creditors for the payment of his debts,¹ testators frequently, by their wills, charged their obligations upon their real property. Whenever such a charge came into a court of equity, it was treated as equitable assets of the estate of the deceased, and the remedy upon it was afforded as upon an equitable mortgage.² Such charges are still frequently dealt with in England, and the courts there readily hold from slight evidence that testators meant them to exist.³ In this country, since land is uniformly and directly available by statute for the payment of decedents' debts, specific charges of them on real property are not so frequent, and not so readily construed by the courts to exist.⁴ But, when a testator makes his intention clear to impose the burden of his debts upon his land to the exoneration of his personalty, he creates what in substance is an equitable mortgage. And those in whose favor such charges are made may have them foreclosed in equity. They come into being by express declarations in wills that they are intended, or by clear indications of the same intent, as by the giving of the land subject to specified debts, or the devise of all the rest of the testator's realty "after the payments of my debts," etc.⁵

§ 454. **Lis Pendens.** — The operation of the doctrine of *lis pendens* may produce another form of equitable mortgage. That doctrine is that the pendency of a suit in equity, brought to obtain a decree affecting the title to, or the possession, enjoyment, or use of, real property, is in itself notice to purchasers and encumbrancers whose rights accrue after the beginning of

¹ Britton, 64 b, c; 2 Blackst. Com. pp. *160—*162.

² Bailey v. Ekins, 7 Ves. 319; Wms. R. P. p. *80.

³ Baden v. Pembroke, 2 Vern. 54; Freemont v. Dedire, 1 P. Wms. 430; *In re* Tucker (1893), 2 Ch. 323; 2 Perry on Trusts, §§ 570—572.

⁴ Lewis v. Ford, 67 Ala. 143; Matter of Powers, 124 N. Y. 361; Matter of Bingham, 127 N. Y. 296; Stevens v. Underhill, 67 N. H. 68; McFarland v. McFarland, 177 Ill. 208; 2 Perry on Trusts, § 570.

⁵ Wright v. Denn, 10 Wheat. (23 U. S.) 204; Potter v. Gardner, 12 Wheat. (25 U. S.) 498; Matter of

Powers, 124 N. Y. 361; Conkling v. Weatherwax, 173 N. Y. 43; Shenk v. Shenk, 150 Pa. St. 521; Thayer v. Finnegan, 134 Mass. 62; Woonsocket Sav. Inst. v. Ballou, 16 R. I. 351; Suydam v. Voorhees, 58 N. J. Eq. 157. But, in this country, an intent to make such a charge must be clearly shown, and will not be raised from general words directing the payment of debts. *Ibid.*; Hamilton v. Smith, 110 N. Y. 159; Decker v. Decker, 121 Ill. 341; White v. Kauffman, 69 Md. 92; 2 Perry on Trusts, §§ 570—572. See Bishop v. Howarth, 59 Conn. 455; Kilford v. Blaney, L. R. 31 Ch. Div. 56.

such suit; and they take subject to, and are bound by, the outcome of the proceeding.¹ This is one of the ancient equitable doctrines, and it owes its early adoption in this country to Chancellor Kent's decision of the case of *Murray v. Ballou*, in 1815.² The requisites of its operation are that the property affected shall be clearly pointed out, the purpose of the suit shall be to establish some definite right against it, and the persons through whom subsequent purchasers or encumbrancers may seek to claim an interest shall be parties to the proceeding.³ The pendency of the suit alone, under these circumstances, and in the absence of statutory change, constitutes notice, and gives to the interested parties a consequent right or lien which is in substance an equitable mortgage.⁴

In practically all of the states of this country, the operation of the equitable doctrine of *lis pendens* is now superseded by statutory provisions, which require written and definite notice to be filed in the methods prescribed, and declare that the mere existence of the suit, in the absence of such a filed statement, is not notice.⁵ (a)

(a) The New York statute, after providing for the filing of such a notice "in an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of, real property," continues, in the following section: "Where a notice of the pendency of an action may be filed, as prescribed in the last section, the pendency of the action is constructive notice, from the time of the filing of the notice, only, to a purchaser or encumbrancer of the property affected thereby, from or against a defendant, with respect to whom the notice is directed to be indexed, as prescribed in the next section. A person, whose conveyance or encumbrance is subsequently executed, or subsequently recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action." Code Civ. Pro. § 1671. See also §§ 1670, 1672-1688; and as to mortgage foreclosure notice, § 1631. See *Hailey v. Ano*, 136 N. Y. 569; *American Press Ass'n v. Blantingham*, 75 App. Div. 435, 437.

¹ *Yearely v. Yearely*, 3 Ch. Rep. 44; *Witham v. Bland*, 3 Swaust. 276; *Tilton v. Cofield*, 93 U. S. 163; *Ladd v. Stevenson*, 112 N. Y. 325; *Hailey v. Ano*, 136 N. Y. 569; *Smith v. Hodsdon*, 78 Me. 180; *Morton v. New Orleans*, etc. Ry. Co., 79 Ala. 590.

² 1 Johns. Ch. (N. Y.) 566.

³ Last two preceding notes; *Turner v. Haupt*, 53 N. J. Eq. 526; *Jones v. McNarrin*, 68 Me. 334; *Evans v. Welch*, 63 Ala. 250; *Gardner v. Watson*, 119

Ill. 312; *Arnold v. Smith*, 80 Ind. 417; *Bispham's Prin. Eq.* § 274.

⁴ *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Dovey's Appeal*, 97 Pa. St. 158; *Jones, Mort.* § 302; *Story, Eq. Jur.* § 406.

⁵ Cal. Code Civ. Pro. § 409; Ind. Code Civ. Pro. 325; Mass. Pub. Stat. ch. 126, § 13; Mich. Comp. Laws, § 441; Minn. Gen. St. § 5866; N. Y. Code Civ. Pro. §§ 1631, 1670-1688; Penn. Laws, ch. 532, § 2; R. I. Gen. L. ch. 246, § 13, etc.

b. Legal Mortgages.

§ 455. **Their General Nature.** — As already stated, legal mortgages are those formally drawn and executed instruments which operate as mortgages in both equity and law. Their history affords the explanation of the form which they continue to wear, even in those jurisdictions in which the results of their existence are mere liens on land.¹ In the ordinary mortgage transaction, at least two, and generally three, distinct elements appear. The two are the deed of conveyance and the defeasance. And the third, when it exists, is a bond, promissory note, or other evidence of personal obligation to repay the loan. A word is needed as to each of these elements. (a)

§ 456. **Conveyance Part of Mortgage.** — The first part of the mortgage instrument is in the form of an absolute conveyance of the land. The only material difference between it and the modern deed which is not a mortgage is that this part of the mortgage usually contains a recital of the debt which it is given to secure. Such recital, however, is not absolutely necessary, and all requirements of the law are complied with if this part of the document be in the ordinary form of a deed of conveyance.

§ 457. **The Defeasance.** — After the conveyance part of the mortgage, comes the defeasance, which provides in substance that if the borrower—the part of the first part in the instrument—repay the loan, or do the other prescribed act or acts as therein required, then the conveyance shall become null and void, but otherwise it shall remain in full force and effect. In the ancient form of mortgage, this defeasance was a separate

(a) The New York statutes prescribe short and convenient forms of mortgages, one for freehold and another for leasehold interests; but add that they do not thereby “prevent or invalidate the use of other forms.” But an additional charge of five dollars may be made by the recording officer for recording a longer form. Real Prop L. § 274. Section 223 of the Real Property Law, Schedule C, gives the form for a mortgage of a freehold interest; and the short covenants and stipulations in that form are explained by §§ 219–222. Section 237, Schedule D, gives the form for a mortgage of a leasehold; and its short covenants and stipulations are explained by §§ 235, 236. The first of these forms was originally L. 1890, ch. 475, § 6, and was amended to its present shape by L. 1897, ch. 277; and the second, was first prescribed by L. 1898, ch. 338.

¹ § 437, *supra*.

and distinct deed, but it early came to be a part of the one mortgage document.¹

Whether the defeasance clause is included in the one document, as is ordinarily the case, or is made and delivered as a separate instrument, the essential requisite is that it and the conveyance part of the mortgage shall be delivered in the same transaction.² For the defeasance delivered first and alone would be inoperative, because of the want of any conveyance upon which it could act; and, if the conveyance portion were first and alone delivered, the grantee would obtain an absolute title, which could not be cut down by the grantor's subsequent act of delivering a defeasance. It is, therefore, absolutely requisite, in order to make a valid legal mortgage, that the two parts shall be delivered in and as one and the same transaction.³ And, where the defeasance is thus properly made and delivered, so that it and the conveying instrument together constitute a legal mortgage, they must be recorded together. Otherwise, in some states, such as New York and New Jersey, the holder derives no advantage from the record of the conveyance; while in others, such as Massachusetts, Maine, and Michigan, following the common-law rule, record of the conveyance alone may enable the holder to pass an absolute title to one who purchases from him innocently and without notice of the defeasance.⁴ (a) But it is to be carefully noted that this

(a) One section of the New York statutes regulates both equitable mortgages and such record of a defeasance, as follows: "A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the record-

¹ 2 Blackst. Com. p. *342; *Dubuque Nat. Bk. v. Weed*, 57 Fed. Rep. 513; *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182, 189; *Snow v. Pressey*, 82 Me. 552.

² *Teal v. Walker*, 111 U. S. 242, 246; *Dedser v. Leonard*, 6 Lans. (N. Y.) 264; *Lane v. Shears*, 1 Wend. (N. Y.) 433; *Nugent v. Riley*, 1 Met. (Mass.) 117; *Sowles v. Butler*, 71 Vt. 271; *Haines v. Thompson*, 70 Pa. St. 434; *Jeffery v. Hursh*, 58 Mich. 246; *Bearss v. Ford*, 108 Ill. 16; *Kyle v. Hamilton*, 136 Cal. xix.

³ *Ibid.*; *Kraemer v. Adelsberger*, 122 N. Y. 467, 474; *Cotton v. McKee*, 68 Me. 486; *Lentz v. Martin*, 75 Ind. 228.

And it is also generally required that the defeasance shall be of as high a character as the conveyance — a specialty when that is so, and executed with as much formality. *Flagg v. Mann*, 14 Pick. (Mass.) 467; *Lund v. Lund*, 1 N. H. 39.

⁴ N. Y. L. 1896, ch. 547, § 269; 1 *Stim. Amer. Stat. L.* § 1860; *Grimstone v. Carter*, 3 Paige (N. Y.), 421; *Purdy v. Huntington*, 42 N. Y. 334, 343; *Corpman v. Baccastow*, 84 Pa. St. 363; *Frink v. Adams*, 36 N. J. Eq. 485; *Smith v. Monmouth Mut. F. Ins. Co.*, 50 Me. 96; *Carpenter v. Lewis*, 119 Cal. 18; *Jones, Mort.* § 513.

principle does not militate against the creation of equitable mortgages, as above explained, by adding defeasances according to the understanding of the parties, or even by annexing them by oral evidence when the transaction is manifestly a loan.¹

§ 458. **The Personal Obligation.** — In addition to the mortgage instrument or instruments, the borrower usually delivers to the lender his bond or note, or makes some other form of extraneous promise to repay the debt. Or he may incorporate such promise in the mortgage document itself. Of these various forms of personal security, the bond of the borrower is preferred in England and the older states of this country. This arises chiefly from the facts that the bond has been most commonly used with the mortgage, and the two are best understood together, and also that the bond, being under seal, is not ordinarily barred by the Statute of Limitations any sooner than the mortgage.²

In New York, Indiana, Michigan, Wisconsin, California, and perhaps a few other states, it is provided by statute that, if there be no express promise by the borrower to repay the money loaned, the lender's only security and redress are upon the mortgage and against the land.³ (a) This is on the prin-

ing thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time." Real Prop. L. § 269, which in substance dates back to the year 1774 (L. 1774, ch. 39) and was 1 R. S. 756, § 3. *Kraemer v. Adelsberger*, 122 N. Y. 467; *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N. Y. 1; *Cook v. Eaton*, 16 Barb. 439; *Stoddard v. Rotton*, 5 Bosw. 378; *Grimstone v. Carter*, 3 Paige, 421; *Howells v. Hettrick*, 13 App. Div. 366.

(a) "A mortgage of real property," says the New York statute, "does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment, has not been given,

¹ *Roberts v. Richards*, 36 Ill. 339; *Hassam v. Barrett*, 115 Mass. 256; *Burnett v. Wright*, 135 N. Y. 543; *Scobey v. Kiningham*, 131 Ind. 552; *Lewis v. Small*, 71 Me. 552; *Fisk v. Stewart*, 24 Minn. 97; § 452, *supra*.

² When the personal obligation is a simple contract debt, and so may become barred, say in six years, the mortgage may often remain a lien on the land after the remedy on the note is lost. *Hulbert v. Clark*, 128 N. Y. 295.

And, on the other hand, it may sometimes occur, as because of the absence of the debtor from the state while the mortgagor (who may be a different person) remains within the state, that the remedy on the mortgage becomes barred before that on the personal security. *Fowler v. Wood*, 78 Hun (N. Y.), 304.

³ N. Y. L. 1896, ch. 547, § 214; 1 Stim. Amer. Stat. L. § 1867.

ciple that he purchases a mortgage interest in the land for the money which he advances ; and, if he mean to have any other security, he should obtain it by express contract.¹

Different Theories of Mortgages.

§ 459. **Legal and Equitable Theories.** — The legal theory of a mortgage was originally that it was a conditional sale and passed the legal title of the land to the mortgagee. The equitable theory has always been that the mortgagor remains the owner of the land, whether his ownership is called legal or equitable.² As the courts of equity have, step by step, shown the way to the best solution of the problems involved in mortgage transactions, the courts of law have followed, more or less willingly ; and to-day it would be inaccurate to state that the theories of the two courts are essentially different. In most jurisdictions, the remedies of both parties are substantially the same in both tribunals.³ But the original differences in the view-points of these courts, and the varying ways in which they have respectively worked towards the results achieved, are the reasons for the still subsisting different theories which are found in the various states. They are to be understood as theories now recognized in any given state in both law and equity. There are many of them. But the three important ones are : (a) The conveyance theory ; (b) The lien theory ; and (c) The theory which combines the elements of the other two. In various jurisdictions, modifications of these theories, especially as produced by statutes, are numerous. But the three named are *the* theories which, being thoroughly comprehended, lead to an intelligible understanding of mortgages in England and all of our states.

the remedies of the mortgagee are confined to the property mentioned in the mortgage." Real Prop. L. § 214, originally 1 R. S. 738, § 139. Thus, in the absence of a pre-existing debt, and with no covenant or separate promise of payment, the mortgagee's only remedy is against the land. *Mack v. Austin*, 95 N. Y. 513 ; *Spencer v. Spencer*, 95 N. Y. 353. And see *Coleman v. Van Rensselaer*, 44 How. Pr. 368 ; *Elder v. Rouse*, 15 Wend. 218 ; *Thomas*, Mort. § 102.

¹ *Kraemer v. Adelsberger*, 122 N. Y. 467 ; *Macaulay v. Smith*, 132 N. Y. 524 ; *Coleman v. Van Rensselaer*, 44 How. Pr. (N. Y.) 368 ; *Baum v. Tomkin*, 110 Pa. St. 569 ; *Hills v. Eliot*, 12 Mass. 26 ; *Halderman v. Woodward*, 22 Kan. 734.

² § 437, *supra*.

³ *Jones*, Mort. § 14 ; *White v. Rittenmyer*, 30 Iowa, 268 ; *Hubbell v. Moulson*, 53 N. Y. 225.

§ 460. (a) **Conveyance Theory.** — In England, Massachusetts, New Hampshire, Maine, Illinois, and probably in some other states, the legal title to the land is transferred by the mortgage to the first mortgagee, and the mortgagor retains only an equitable interest or estate in the property — his equity of redemption.¹ Second and third and other subordinate mortgages, therefore, can convey to their owners only equitable liens or claims. On this theory, as will be more fully explained hereafter, the mortgagee, being the owner of a legal estate in the land, would have an inherent right to the possession of it, but for the ordinary adverse provisions of the instrument itself;² and the mortgagor has an *equitable estate*,³ which, as equitable realty, may descend to his heirs or be deeded or devised away, and in which there is ordinarily dower, curtesy, and the other usual incidents of such estates.⁴

§ 461. (b) **Lien Theory** — In New York, Michigan, Wisconsin, California, and the great majority of the American states, the mortgage is treated as conferring upon the mortgagee merely a lien on the land, which lien is only personalty in his hands; and as leaving the legal title and estate in the hands of the mortgagor.⁵ All mortgages, therefore, whether first, second, third, or more inferior, are simply liens, ordinarily having priority in the order of their creation.⁶ The mortgagor's interest, although still called his *equity*, remains a legal estate, and the term "equity," as applied to it, is strictly a misnomer.⁷ His estate is, of course, capable of transfer by conveyance or devise, it may descend to his heirs subject to the mortgage, it

¹ *Green v. James*, 6 M. & W. 656; *Lloyd v. Lloyd* (1903), 1 Ch 385; *Ersine v. Townsend*, 2 Mass. 493; *Flye v. Berry*, 181 Mass. 442; *Tripe v. Marcy*, 39 N. H. 439; *Atwood v. Moore*, 85 Me. 379; *Barrett v. Hinckley*, 124 Ill. 32.

² *Ibid.*; *Keech v. Hall*, 1 Doug. 21; *Rockwell v. Bradley*, 2 Conn. 1; *Lackey v. Holbrook*, 52 Mass. 458; *Youngman v. Elmira*, etc. R. Co., 65 Pa. St. 278; *Kranz v. Oedelhofen*, 193 Ill. 477.

³ *Chamberlain v. Thompson*, 10 Conn. 243; *Norcross v. Norcross*, 105 Mass. 265; *Flye v. Berry*, 181 Mass. 442; *Stewart v. Barrow*, 7 Bush (Ky.), 368; *Blancy v. Bearce*, 2 Me. 132; *Huckins v. Straw*, 34 Me. 166; *Ellison v. Daniels*, 11 N. H. 274.

⁴ *Kennett v. Plummer*, 28 Mo. 142;

Grigg v. Banks, 59 Ala. 311; *Walters v. Defenbaugh*, 90 Ill. 241; *Graves v. Braden*, 62 Ind. 93; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Terry v. Rosell*, 32 Ark. 478; *Bigelow v. Wilson*, 18 Mass. 485.

⁵ *Sexton v. Breese*, 135 N. Y. 387; *Trimm v. Marsh*, 54 N. Y. 599; *Dutton v. Warschauer*, 21 Cal. 609; *Fletcher v. Holmes*, 32 Ind. 497; *Reading v. Waterman*, 46 Mich. 107; *Jordan v. Sayre*, 29 Fla. 100; *Wood v. Trask*, 7 Wis. 566; *Thomas, Mort.* § 26; *Jones, Mort.* § 48.

⁶ *Goodman v. White*, 26 Conn. 317; *Freeman v. Schroeder*, 43 Barb. (N. Y.) 618; *Stoddart v. Hart*, 23 N. Y. 556.

⁷ *Kortright v. Cady*, 21 N. Y. 343, 365.

may have dower, curtesy, and the other ordinary incidents of legal interests.¹ On this theory, as will be more fully explained hereafter, the mortgagee as such ordinarily has no right to take possession of the land.²

There are some particulars, however, in which, under this lien theory, a mortgage still resembles a deed of conveyance. Thus, a covenant of warranty in a mortgage may operate by estoppel in favor of the mortgagee in the same manner as such a covenant in a deed in favor of the vendee; and, just as a vendee under a warranty deed may acquire by virtue of the warranty all the interest or estate in the land which may subsequently accrue in favor of the vendor, so the mortgagee whose mortgage contains a warranty may obtain a lien upon all the interest in the land which accrues in favor of the mortgagor after the delivery of the mortgage.³ Again, in the law of fixtures, a mortgagee is favored in the same manner as though he were a vendee. The mortgagor, having annexed a fixture to the land, can no more successfully claim it against his mortgagee than can a vendor, who has placed fixtures upon the property, take them away to the injury of his vendee.⁴ Lastly, a mortgagee, under the lien theory is, *sub modo*, a purchaser of the land; because, if the mortgage be foreclosed and the property sold, the vendee takes the same estate and interest which the mortgagor had at the time of his delivery of the mortgage.⁵ The mortgage, and the deed which passes as the result of its foreclosure, together constitute the link in the chain of title which passes it from the mortgagor to the purchaser at the foreclosure sale.⁶

§ 462. (c) **Combination Theory.** — In a few of the American states, of which New Jersey, Delaware, and Missouri are examples, the lien theory of a mortgage controls it and its operation until the law day. After that day, the mortgagee has

¹ Trimm v. Marsh, 54 N. Y. 599; Buchanan v. Moore, 22 Tex. 537; Heth v. Cocke, 1 Rand. (Va.) 344; Burrall v. Bender, 61 Mich. 608.

² Durand v. Marcks, 4 McCord (S. C.), 54; Trimm v. Marsh, 54 N. Y. 599; Michigan Trust Co. v. Lansing Lumber Co., 103 Mich. 392.

³ Tefft v. Munson, 57 N. Y. 97; Oliphant v. Burns, 146 N. Y. 218, 232; Howze v. Dew, 90 Ala. 178; Gibbons v. Hoag, 95 Ill. 45; Pratt v. Pratt, 96 Ill.

184; Williamson v. N. J. So. Ry., 28 N. J. Eq. 277, 298.

⁴ McFadden v. Allen, 134 N. Y. 489; Potter v. Cromwell, 40 N. Y. 287; Matzon v. Griffin, 78 Ill. 477; Harmony B'ld'g Ass'n v. Berger, 99 Pa. St. 320; § 28, *supra*.

⁵ Per Rapallo, J., in National Bank v. Levy, 127 N. Y. 549, 553.

⁶ Ibid.; Beinstein v. Neales, 144 N. Y. 347; Welles v. Garbutt, 132 N. Y. 430; Riggs v. Pursell, 66 N. Y. 193; Baldwin v. Howell, 45 N. J. Eq. 519.

a right to enter and take possession of the land, either peaceably, or by ejectment if necessary; and he is thus treated substantially as if he were the owner of the property. That is, in effect, the mortgage is a lien until the debt is due; and, if not paid off or otherwise discharged on the law day, it then operates as a conveyance of the legal title and estate to the mortgagee.¹

¹ *Woodside v. Adams*, 40 N. J. L. 417; *Shields v. Lozear*, 34 N. J. L. 496; *Hall v. Tunnell*, 1 *Houst. (Del.)* 320; *Walker v. Farmer's Bank*, 8 *Houst. (Del.)* 258; *Cornog v. Cornog*, 3 *Del. Ch.* 407; *Johnston v. Houston*, 47 *Mo.* 227.

CHAPTER XXVII.

MORTGAGES. — INTERESTS, RIGHTS, AND DUTIES OF THE PARTIES.

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Interest, Rights, and Duties of Mortgagee.

§ 463. **General Nature of his Interest.** — In England, mortgages were at one time frequently made for a long term of years, as for one or more thousands of years.¹ But that system has been abolished there; and it never had any material operation in this country.² The form of the conveyance part of the ordinary mortgage at the present time is that of a transfer of the land to the mortgagee and his heirs; so that, standing alone, it would convey to him an estate in fee simple. The time during which the mortgage is actually intended by the parties to continue is then designated in the defeasance part (or, sometimes, in the recitals) and also in the accompanying bond or note, when any exists. Tersely, therefore, the form of a mortgage transaction may be said to be, as a rule, a conveyance of real property in fee simple, defeasible after a stipulated time.³ Its operation and effects upon the position of the mortgagee require to be examined with respect to each of the chief theories of a mortgage.

§ 464. **Interest of Mortgagee under Conveyance Theory.** — The English and Massachusetts theory of a mortgage results, as before explained, in conferring the legal title and estate upon the mortgagee.⁴ He becomes for many purposes the owner of the land in fee, his interest being defeasible on condition subsequent. Therefore, the devolution and descent of his ownership are, in the main, the same as that of the interest of any other holder in fee. He may deed or devise away the legal title, and upon his death intestate it may descend to his heirs.⁵ Theoretically, there would be dower and curtesy in his interest; but practically, because such rights must be precarious and held temporarily, — subject to the right of redemption, — they have ordinarily been denied as incidents of his estate.⁶

¹ Stephens v. Bridges, 6 Madd. 66;² Blackst. Com. p. *158; 2 Poll. & Mait. Hist. Eng. L. (2d ed.) pp. 121-123.³ 4 Kent's Com. pp. *86-*94.⁴ Jones, Mort. § 12; 1 Powell, Mort. p. 7; 2 Wash. R. P. (6th ed.) §§ 975, 980.⁵ § 460, *supra*; Willis v. Eastern Trust & Banking Co., 169 U. S. 295, 304.⁶ Fisk v. Fisk, Prec. Chan. 11; Smith v. Dyer, 16 Mass. 18; Kinna v. Smith, 3 N. J. Eq. 14; Van Dyne v. Thayre, 14 Wend. (N. Y.) 233; Thomas, Mort. § 10.⁶ Foster v. Dwinel, 49 Me. 44; Moore v. Esty, 5 N. H. 479; 2 Wash. R. P. (6th ed.) § 1044.

Since under this theory the mortgagee holds the bond or note as personal property, and has it secured by his estate in fee in the land, his death intestate would pass the mortgage to his heirs, and the bond or note to his executors or administrators.¹ This was the common-law result of such an occurrence; but it was decided that the heirs must then hold the interest in the land in trust for the owners of the personal security.² This separation of the two securities for the same debt — the bond and the mortgage — frequently caused cumbersome and annoying proceedings. It was, accordingly, provided in England, by the statute 44 & 45 Vict. ch. 41, § 30, that, on the death of the mortgagee, both the mortgage and the debt which it secured, whether the latter was represented by bond, note, or otherwise, should pass to his personal representatives. Similar statutory provisions are found in the states of this country in which the mortgage is regarded as transferring the legal estate in the land.³

The passing of the law day does not change the position of a mortgagee in whom is the legal estate in the first instance. The original transaction, conferring upon him as it does the legal estate, gives him the right to possession unless this is prevented by the express terms of the contract.⁴ Such terms are now ordinarily inserted in the mortgage. But, when found there, they usually are made to operate only until the law day. Therefore, the passing of the law day gives to such a mortgagee, as a rule, the right to take possession of the land which would have been his in the first instance but for the contrary stipulation.⁵ Even under this theory of a mortgage, however, it is constantly borne in mind by the courts that the transaction is, after all, only by way of security; the equity of redemption is jealously preserved, and in cases of doubtful construction the holder of the mortgage is accorded no greater rights and privileges than

¹ *Gibson v. Bailey*, 9 N. H. 168, 173; *Clerkson v. Bowyer*, 2 Vern. 66; *Smith v. Dyer*, 16 Mass. 18; *Flye v. Berry*, 181 Mass. 442; 2 Wash. R. P. (6th ed.) § 1044.

² *Clerkson v. Bowyer*, 2 Vern. 66; *Gibson v. Bailey*, 9 N. H. 168, 173; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 145; *Thornborough v. Baker*, 1 Ch. Cas. 283.

³ R. S. Mass. 1902, ch. 150, § 7; *Maine*, R. S. ch. 90, §§ 11, 12; *R. I.* Gen. L. ch. 214, §§ 7-10; *Vt. Stats.*

§§ 2464-65; *Haskins v. Hawkes*, 108 Mass. 379; *Brown v. Mayor*, 128 Mass. 284; *Webster v. Calden*, 56 Me. 204, 210; *Hoyt v. Hoyt*, 61 Vt. 413, 416.

⁴ *Newall v. Wright*, 3 Mass. 138; *Simpson v. Dix*, 131 Mass. 179; *Gray v. Gillespie*, 59 N. H. 469; *Foster v. Perkins*, 42 Me. 168.

⁵ *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303; *Shaw v. Norfolk Co. Ry.*, 5 Gray (Mass.), 162; *Haven v. Gr. Junction R. R.*, 12 Allen (Mass.), 337; *Wilhelm v. Lee*, 2 Md. Ch. 322.

are requisite to the enforcement of his security.¹ As said in a New Hampshire case, "the right of the mortgagee to have his interest treated as real estate extends to and ceases where it ceases to be necessary to enable him to protect or avail himself of his just rights intended to be secured to him by the mortgage."² Therefore, for example, in an action of ejectment by the mortgagor against a third party in possession, such third party can not defend by setting up the title of the mortgagee; for such title only exists for the latter's security, as between him and the mortgagor.³

§ 465. **Interest of Mortgagee under Lien Theory.** — In the great majority of the states of this country, the mortgagee, having only a lien on the land, is the owner of merely a personal interest therein.⁴ Both the mortgage and the bond, note, or other obligation which it secures, are personal property in his hands. Therefore, the devolution and descent of these are the same; they may be transferred as chattels, and, on his death intestate, they together pass to his executors or administrators as assets of his estate.⁵ There is, of course, no dower or curtesy in them, and they lack the ordinary incidents of realty. The mortgage transaction ordinarily confers upon the mortgagee no right to possession of the land, and, if he acquire such right, it is by virtue of some special contract or combination of circumstances.⁶ The passing of the law day does not change his position or rights. He simply acquires a lien by virtue of his mortgage, and a lien it remains until discharge or foreclosure.⁷

§ 466. **Interest of Mortgagee under Combination Theory.** — In those few states in which the mortgage creates simply a lien until the law day, and then substantially confers upon the mortgagee the title to the land and the right to possession, his interest, rights, and duties are, before the passing of the law day, the same as those of a mortgagee of land in a state where the

¹ *Glass v. Ellison*, 9 N. H. 69; *Gabbert v. Schwartz*, 69 Ind. 450; *Hall v. Lance*, 25 Ill. 251; *Clinton v. Westbrook*, 38 Conn. 9, 14; *Jones, Mort.* § 11; 2 Wash. R. P. (6th ed.) § 1044.

² *Ellison v. Daniels*, 11 N. H. 274.

³ Last two preceding notes.

⁴ § 461, *supra*; *Sexton v. Breese*, 135 N. Y. 387; *Fletcher v. Holmes*, 32 Ind. 497; *McMillan v. Richards*, 9 Cal. 365; *Thompson v. Marshall*, 21 Oreg.

171; 20 Amer. & Eng. Ency. of L. (2d ed.) p. 902.

⁵ *Ibid.*; *Trimm v. Marsh*, 54 N. Y. 599, 604; *Packer v. Rochester, etc. R. Co.*, 17 N. Y. 283, 296; 2 Wash. R. P. (6th ed.) § 1045.

⁶ *Grattan v. Wiggins*, 23 Cal. 16, 26; *Shields v. Lozier*, 34 N. J. L. 496; *Trimm v. Marsh*, 54 N. Y. 599. As to dower in connection with mortgages, see § 481, *infra*.

⁷ *Ibid.*

lien theory exists in its entirety; and, after that day, they are the same as those of a mortgagee of land in a state where the conveyance theory exists in its entirety.¹

§ 467. **Rights and Duties of Mortgagee.** — There are several important positions and rights, belonging to a mortgagee under any theory of a mortgage, which require a special and somewhat more extended discussion. These may be dealt with under the headings of his assignment of the mortgage, his position as a mortgagee in possession, his relation to a lessee of the land, and his position toward one who claims a dower interest in the property.

§ 468. **Assignment of a Mortgage — How made.** — The holder of a mortgage, who has not restricted himself by contract, may assign the security.² An ordinary transaction in this particular consists of a transfer together of both the mortgage and the evidence of debt which it secures. It will conduce to clearness to treat first of this usual form of assignment.

The bond or other evidence of debt, being always personal property, may of course be transferred merely by delivery. And the same is true of a mortgage where it is only a lien.³ In most of the states of this country, therefore, these instruments may be effectually assigned without writing and solely by manual delivery. Mortgages, however, are not, as a rule, transferred in this way; but rather by a written assignment, which is more commonly in the form of a separate deed, though occasionally it is made on the mortgage instrument itself. In those jurisdictions in which a mortgage confers the legal title upon the mortgagee, its assignment must be in writing in order to comply with the requirements of the Statute of Frauds, because it is a transfer of a real-property interest.⁴ The writing may take the form of a quit-claim deed of the mortgaged land, or any more important deed up to that which contains full covenants and warranties.⁵ Or it may be a devise.⁶

¹ *Cooch v. Gerry*, 3 Har. (Del.) 280; *Cornog v. Cornog*, 3 Del. Ch. 407; *Fox v. Wharton*, 5 Del. Ch. 200; *Shields v. Lozeur*, 34 N. J. L. 496; *Kircher v. Schalk*, 39 N. J. L. 335.

² *Gould v. Newman*, 6 Mass. 239; *Kellogg v. Ames*, 41 N. Y. 259; *Mechanics' Bank v. Weill*, 163 N. Y. 486; *Savings Bank v. Holt*, 58 Vt. 166; *Murray v. Porter*, 26 Neb. 288; *Sanders v. Cassidy*, 86 Ala. 246.

³ *Fryer v. Rockefeller*, 63 N. Y. 268; *Wing v. Raplee*, 17 Weekly Dig. 415,

aff'd, 101 N. Y. 620; *Yates Co. Nat. Bk. v. Baldwin*, 43 Hun (N. Y.), 136, s. c. 124 N. Y. 633; *Pease v. Warren*, 29 Mich. 9; *Kamena v. Huelbig*, 23 N. J. Eq. 78.

⁴ *Dacus v. Streety*, 59 Ala. 183; *Stanley v. Kempton*, 59 Me. 472; *Warden v. Adams*, 15 Mass. 233.

⁵ *Conner v. Whitmore*, 52 Me. 185; *Barnes v. Boardman*, 149 Mass. 106; *Lawrence v. Stratton*, 6 Cush. (Mass.) 163; *Collamer v. Langdon*, 29 Vt. 32.

⁶ *Van Wagnen v. Brown*, 26 N. J. L. 196; *Coote, Mort.* p. 570.

§ 469. **Assignment of Debt or Mortgage alone — The Debt the Principal Thing.** — In a few of the American states, such as Massachusetts, Maine, and Illinois, the mortgage is practically treated as the more important, or at least as more than a mere incident to the debt; and the assignment of the debt alone, in such states, does not carry to the assignee the mortgage security.¹ Even in such jurisdictions, however, the assignor then retains the mortgage in trust for the assignee.² But in New York, New Jersey, Michigan, Wisconsin, California, and generally in the middle, southern, and western states, the fundamental theory of the mortgage transaction is that "*The debt is the principal thing*," and whoever owns it owns also any mortgage by which it may be secured.³ Therefore, an assignment of the debt is an assignment of the mortgage. And an assignment of any part of the debt is an assignment of a *pro rata* portion of the mortgage.⁴ This is well illustrated by such mortgages (or trust deeds) as those executed by railroad companies or other corporations, which are given to secure a series of bonds. As the bonds pass from hand to hand by delivery, the proportionate interests in the mortgage (which is usually in the hands of a trust company) pass with them.⁵ One of

¹ *Young v. Miller*, 6 Gray (Mass.), 152; *Barnes v. Boardman*, 149 Mass. 106; *Fitzgerald v. Beckwith*, 182 Mass. 177; *Smith v. Kelley*, 27 Me. 237; *Kilgour v. Gockley*, 83 Ill. 109; *Barrett v. Hinckley*, 124 Ill. 32; *Bailey v. Winn*, 101 Mo. 649.

² *Morris v. Bacon*, 123 Mass. 58; *Jordan v. Cheney*, 74 Me. 359; *Barrett v. Hinckley*, 124 Ill. 32; *Graham v. Newman*, 21 Ala. 497.

³ *Jackson v. Blodget*, 5 Cow. (N. Y.) 202; *Payne v. Wilson*, 74 N. Y. 348, 354; *Fitch v. McDowell*, 145 N. Y. 498; *Flemington Nat. Bk. v. Jones*, 50 N. J. Eq. 244; *Magie v. Reynolds*, 51 N. J. Eq. 113; *Briggs v. Hannowald*, 35 Mich. 474; *Lane v. Duchac*, 73 Wis. 646; *Logan v. Smith*, 62 Mo. 455; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373; *Carpenter v. Longan*, 16 Wall. (83 U. S.) 271; 3 Pom. Eq. Jur. § 1210.

⁴ *Ibid.*; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Gould v. Marsh*, 1 Hun (N. Y.), 566; *Stevenson v. Black*, 1 N. J. Eq. 338; *Jennings v. Moore*, 83 Mich.

231; *Blair v. White*, 61 Vt. 110; *Lewis v. Farrell*, 51 Conn. 216; *Phelan v. Olney*, 6 Cal. 478.

⁵ *Muller v. Wadlington*, 5 Rich. (S. C.) 342; *Miller v. Rutland*, etc. R. Co., 40 Vt. 399; *O'Beirne v. Allegheny*, etc. R. Co., 151 N. Y. 372; *Dickerson v. Northern R. Co.*, 176 U. S. 181; *Pardee v. Aldridge*, 189 U. S. 429; *Northern Pacific Ry. v. Townsend*, 190 U. S. 271. It is said in some states that, if the notes secured mature at different times, their owners are entitled to priority of payment in the order of their maturity. *Minor v. Hill*, 58 Ind. 176; *Isett v. Lucas*, 17 Iowa, 503; *Anderson v. Sharp*, 44 Ohio St. 260. But the rule of the Federal Courts and the weight of authority make them payable *pro rata*, regardless of the times of their maturity, unless there is a contrary, controlling agreement. *Lowell v. Cragin*, 136 U. S. 147; *Perry's Appeal*, 22 Pa. St. 43; *Penzel v. Brookmire*, 51 Ark. 105; *Granger v. Crouch*, 86 N. Y. 494; *Boies v. Benham*, 127 N. Y. 620; *Norton v. Palmer*, 142 Mass. 433.

the results of the operation of this theory, that the debt is the principal thing, also appears in the rule recognized in this country that a debt secured by mortgage and held by two or more executors, administrators, or other joint owners, may be validly assigned, together with the mortgage, by one or more of them, less than the whole number, as well as by them all.¹

An assignment of the mortgage alone, in some of the states which have adopted the conveyance theory, simply causes the assignee to hold it in trust for the owner of the bond or other evidence of debt.² But in a number of these, and in practically all states which have the lien theory of a mortgage, it is held that the attempted assignment of the mortgage alone, without any transfer of the debt thereby secured (especially when the debt is evidenced by a separate bond or other instrument) is null and void.³ The plain principle here is that, even if such assignment could carry the legal lien, the assignee must hold it as a resulting trustee for the owner of the debt; and the trust, being passive and for no useful purpose, would be executed by the passing over of the title to him to whom it rightfully belonged.⁴ In the rare cases in which the lender of money takes nothing but a mortgage for his security, and has no personal promise of the borrower to repay the debt, that which he holds, standing as it necessarily does alone, may be assigned alone by the methods above indicated; and the assignee may thereby acquire all the rights of his assignor. And, in any transaction in which the intent of the parties is made clear, the assignee of the mortgage alone (in form) may acquire also any personal claim that may exist in connection therewith.⁵

§ 470. **Compulsory Assignment of Mortgage.** — The assignments thus far considered are voluntary. But, after a mortgage debt is due and payable, the holder, especially in states where the lien theory prevails, may sometimes be compelled to assign it and its mortgage security against his will. This may

¹ *Hertell v. Bogert*, 9 Paige (N. Y.), 52; *George v. Baker*, 3 Allen (Mass.), 326, and note. Though this has been denied in England. *In re Spradbery*, L. R. 14 Ch. Div. 514.

² *Sanger v. Bancroft*, 12 Gray (Mass.), 365; *Collamer v. Langdon*, 29 Vt. 32; *Barrett v. Hinckley*, 124 Ill. 32; *Swan v. Yapple*, 35 Iowa, 248; *Williams v. Teachey*, 85 N. C. 402; *Welsh v. Phillips*, 54 Ala. 309.

³ *Merritt v. Bartholick*, 36 N. Y. 44; *Murray v. Wilson*, 111 N. Y. 295; *Devlin v. Collier*, 53 N. J. L. 422; *Lunt v. Lunt*, 71 Me. 377; *Ellison v. Daniels*, 11 N. H. 275; *Hobson v. Roles*, 20 N. H. 41; *Pickett v. Jones*, 63 Mo. 195; *Thomas*, Mort. § 302.

⁴ *Ibid.*; §§ 330, 331, *supra*.

⁵ *Bulkley v. Chapman*, 9 Conn. 5; *Larned v. Donovan*, 31 Abb. N. C. (N. Y.) 308; *Thomas*, Mort. §§ 303, 304.

occur when the debt is paid or tendered by a person who is in equity not bound to make such payment, and for the protection of whose rights an assignment of the mortgage to or for him is necessary.¹ Such, for example, is a junior mortgagee, when the prior mortgage debt is due and the property is rapidly depreciating in value, or the mortgagor is letting interest or taxes or assessments accumulate, or, because of other special circumstances, the equitable rights of the inferior lienor are being dissipated.² So a surety on the bond, who pays the debt, having the right of subrogation against the mortgagee, also has, as incident thereto, when needed for his protection, a right to the formal assignment of the mortgage to himself.³ Persons who occupy such positions as these, on properly tendering all that is due on account of the mortgage, and presenting a written assignment ready to be executed by the mortgagee, may, on his refusal to make the assignment and on their being able to show that such refusal is impairing their equitable rights, maintain a suit in equity to compel an assignment of the mortgage.⁴

§ 471. **Position and Rights of Assignee of Mortgage — Non-Negotiability of Mortgages.** — As already explained, in the great majority of our states, the assignee of the debt owns both the debt and the mortgage by which it is secured. In the ordinary transaction of this nature, he takes them subject to all the equities, whether latent or otherwise, which exist in favor of the mortgagor or of any third party or parties.⁵ In the English and United States courts, and the courts of some of our states, the distinction is recognized that, whereas he is bound by equities in favor of the mortgagor or debtor, he is not affected by latent equities, such as secret rights which may exist against the mortgage in favor of third parties.⁶ But this is strongly

¹ *Johnson v. Zink*, 51 N. Y. 333; *Welling v. Ryerson*, 94 N. Y. 98; *Mabbett v. Mabbett*, 29 N. Y. App. Div. 609; *Lamb v. Jeffrey*, 41 Mich. 719. See, *contra*, *Lumsden v. Manson*, 96 Me. 357.

² *Frost v. Yonkers Sav. Bk.*, 70 N. Y. 553; *Lamb v. Jeffrey*, 41 Mich. 719.

³ *McLean v. Towle*, 3 Sand. Ch. (N. Y.) 117. For distinctions between subrogation and assignment, as affecting a mortgage, see *Thomas*, *Mort.* §§ 687, 688-690.

⁴ Last three preceding notes.

⁵ *Norris v. Marshall*, 5 Madd. 475;

Dixon v. Winch, 68 L. J. Ch. 572; *Merkle v. Beidelman*, 165 N. Y. 21; *Mechanics' Bk. v. Weill*, 163 N. Y. 486; *Buehler v. Pierce*, 175 N. Y. 264, 267; *Woodruff v. Morristown Sav. Inst.*, 34 N. J. Eq. 174; *Cooley v. Harris*, 92 Mich. 126, 135; *Croft v. Bunster*, 9 Wis. 503; *Fish v. French*, 15 Gray (Mass.), 520; *Bispham's Prin. Eq.* § 170.

⁶ *Carpenter v. Longan*, 16 Wall. (83 U. S.) 271; *Humble v. Curtis*, 160 Ill. 193; *Downey v. Tharp*, 63 Pa. St. 322; *Bispham's Prin. Eq.* § 171; *Pom. Eq. Jur.* § 715; *Jones*, *Mort.* § 843.

opposed in New York and some of the other states. "It is' . . . the settled law of this state," says the New York Court of Appeals, "though a different rule prevails not only in England, but in the Federal Courts and in some of the states, that a *bona fide* purchaser of a chose in action takes it subject not only to the equities between the parties, but also to latent equities in favor of third persons, and that to secure his superiority it is not necessary that the earlier assignee should give any notice of his assignment to the debtor or trustee."¹

It sometimes happens, however, and in quite a few of the western states it frequently occurs, that a mortgage is given to secure the payment of a negotiable instrument such as a promissory note or a bill of exchange; and perhaps the prevailing rule in this country as to such a transaction is that, if an assignee take the negotiable instrument in such manner that he can enforce its payment, he can also enforce the accompanying mortgage as security for its payment.² In this sense, the mortgage may have a negotiable or semi-negotiable character. But this can not be said to be the rule of New York or New Jersey, nor of several of the best courts of this country.³

It is to be added that, between the assignor and assignee of a mortgage, since the subject-matter of the transaction is personalty or used as equivalent to personal security, there are implied warranties that the title to the mortgage is valid, that it is not a forgery, that it has not been paid in whole or in part, except as directly specified, that there are no legal defences against it, and that it is enforceable for the amount which it purports to secure.⁴

§ 472. Proper Steps in taking Assignment. — When an as-

¹ *Central Trust Co. v. West India Ins. Co.*, 169 N. Y. 314, 323; *Stevenson Brewing Co. v. Iba*, 155 N. Y. 224; *Owen v. Evans*, 134 N. Y. 514, 519; *Trustees of Union Col. v. Wheeler*, 61 N. Y. 88; *Scheurer v. Brown*, 67 N. Y. App. Div. 567, 570; *Kleeman v. Frisbie*, 63 Ill. 482; *Tabor v. Fox*, 56 Iowa, 539; *Pom. Eq. Jur.* § 708.

² *Burhans v. Hutcheson*, 25 Kan. 625; *Kelley v. Whitney*, 45 Wis. 110; *Mack v. Prang*, 45 Lawy. Rep. Ann. (Wis.) 407; *Webb v. Hoselton*, 4 Neb. 308; *Barnum v. Phenix*, 60 Mich. 388; *Thompson v. Maddux*, 117 Ala. 468; *Watson v. Wyman*, 161 Mass. 96; *Keyes*

v. Wood, 21 Vt. 331; *Jones, Mort.* § 834; *Thomas, Mort.* § 308.

³ *Trustees of Union Col. v. Wheeler*, 61 N. Y. 88, 106; *Rapps v. Gottlieb*, 142 N. Y. 164, and New York cases cited in last preceding note but one; *Woodruff v. Morristown Sav. Inst.*, 34 N. J. Eq. 174, 178; *Buehler v. McCormick*, 169 Ill. 269; *Hazle v. Bondy*, 173 Ill. 302; *Watkins v. Goessler*, 65 Minn. 118; *Tabor v. Fox*, 56 Iowa, 539; *Jones, Mort.* § 834, note.

⁴ *Burt v. Devery*, 40 N. Y. 283; *Furniss v. Ferguson*, 34 N. Y. 485; *Parks v. Morris Ax & T Co.*, 54 N. Y. 586; *Thomas, Mort.* § 333.

signment of a mortgage, or of it and the accompanying evidence of debt, is to be carried through, the following steps are ordinarily requisite to the proper securing of the assignee's interest.

(a) The title to the mortgaged realty should be examined, for the purpose of determining whether or not the assignor can transfer a valid security. (b) Because the mortgage is usually not negotiable, and must be taken subject to outstanding equities, there should be obtained (preferably in writing) from the mortgagor and from the present holder of the land and prior lienors and all other ascertainable persons who might set up defences in case of foreclosure, statements or other positive representations as to the amount of the principal of the debt, the rate of interest, the time of last payment of interest, the time of maturity of the loan, and all other facts tending to indicate the existence or non-existence of any defences, either legal or equitable, against the mortgage or the debt. These are known as estoppel statements.¹ (c) The assignment should be drawn in writing (though this is not absolutely essential in some states, as above shown);² and, when the transaction is completed, the assignee should obtain possession of such assignment and the bond, if any, the mortgage, and all other assignments or transfers material to perfect the assignee's title to the mortgage and the debt which it secures. (d) The assignment delivered should be at once placed on record, and with it any other of the instruments above-named, which have not been previously recorded and which are authorized to be recorded so as to become constructive notice. (e) Personal notice should be served on the mortgagor, or other person obligated to pay the interest and the mortgage debt; and this notice should be accompanied by a demand that thereafter accruing interest, and ultimately the principal of the debt, be paid to the assignee of the mortgage. This last step is needed because the record of the assignment in most states acts only *prospectively*, and therefore gives no constructive notice to the mortgagor nor to any one who already owns an interest in the mortgaged property.³ (a)

(a) The New York statute expressly declares that: "The recording of an assignment of a mortgage is not, in itself, a notice of such assignment

¹ *Payne v. Burnham*, 62 N. Y. 69; *Weyh v. Boylan*, 85 N. Y. 394; *Rapps v. Gottlieb*, 142 N. Y. 164; *Thomas, Mort.* §§ 324-332; *Jones, Mort.* §§ 844 a, 845.

² § 468, *supra*.

³ N. Y. L. 1896, ch. 547, § 271; *Curtis v. Moore*, 152 N. Y. 159; *Van Keuren v. Corkins*, 66 N. Y. 77; *Foster v. Carlson*, 159 Pa. St. 477; *Rodgers v. Peckham*, 120 Cal. 238; *Thomas, Mort.* § 334; 1 *Stim. Amer. Stat. L.* § 1870.

§ 473. **Mortgagee in Possession** — **When he may take Possession.**— Under the common-law or conveyance theory of a mortgage, the mortgagee would be entitled to possession of the land from the beginning of the transaction, but for the fact that it is usually stipulated between the parties that he shall not enter before the law day. After the passing of that day, his right to take possession ordinarily accrues; and he may enforce it by ejectment, if necessary.¹

In those states in which the equitable or lien theory prevails, the mortgagee simply as such ordinarily has no right to possession, either before or after the law day.² And, where the combination theory prevails, the nature of the mortgage in like manner precludes him from entering before that day.³ Even in such jurisdictions as these, however, while the mortgagee has nothing but a lien on the land, circumstances occasionally arise which result in his taking possession of the property. Thus, if a prior mortgage be foreclosed in such manner as to cut off the equity of redemption of the mortgagor or landowner, but a subordinate lienor be not made a party to the foreclosure suit, the mortgagee, if he purchase at the foreclosure sale, becomes a mortgagee in possession as to such omitted inferior claimant.⁴ So, if one enter into possession under some other right, as, for example, under a contract to purchase the land, and subsequently he acquire a mortgage upon the property, he may continue in possession as mortgagee.⁵ And the principle is to be emphasized generally that, under any theory of a mortgage, when the mortgagee as such has once properly acquired possession of the land, he may retain it until foreclosure, or other satisfaction of the mortgage debt.⁶

to a mortgagor, his heirs or personal representatives, so as to invalidate a payment made by either of them to the mortgagee." Real Prop. L. § 271, originally 1 R. S. 763, § 41. And this, like the similar acts of several other states, is simply a legislative statement of a general principle. *Brewster v. Carnes*, 103 N. Y. 506; *Van Keuken v. Corkins*, 66 N. Y. 77; *Frear v. Sweet*, 118 N. Y. 454; *Curtis v. Moore*, 152 N. Y. 159.

¹ *Lucky v. Holbrook*, 11 Met. (Mass.) 458; *Gray v. Gillespie*, 59 N. H. 469; 4 Kent's Com. pp. * 154, * 155; *Jones, Mort.* § 702.

² *Bryan v. Brasius*, 162 U. S. 415; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534; *Kortright v. Cady*, 21 N. Y. 343, 364; *Brinkman v. Jones*, 44 Wis. 498; 4 Kent's Com. p. * 155.

³ *Shields v. Lozear*, 34 N. J. L. 496.

⁴ *Robinson v. Ryan*, 25 N. Y. 320; *Moulton v. Cornish*, 138 N. Y. 133, 139. See *Shriver v. Shriver*, 86 N. Y. 575, 580.

⁵ *Thomas, Mort* § 239.

⁶ *Romog v. Gillett*, 187 U. S. 111; *Hubbell v. Sibley*, 50 N. Y. 468, 470; *Barson v. Mulligan*, 66 N. Y. App. Div. 486; *Jones, Mort.* § 715.

In cases in which the mortgagee can not take possession of the land against the will of the mortgagor, if the latter injure the property so that the security of the former is being dissipated, the mortgagee may always have relief in equity, as by injunction or by the appointment of a receiver. But he can not have an action at law for waste against the mortgagor; and it is only when he is in possession that he can have trespass at law either against a stranger or the mortgagor who injures the property.¹ When he is out of possession, however, his equitable remedy, as above explained, is ordinarily sufficient, and compensates him in most instances for his inability to acquire possession of the land before foreclosure.

§ 474. **Position and Duties of Mortgagee in Possession.** — Many attempts have been made to assimilate the position of the mortgagee in possession to that of other holders of land. But it is *sui generis*. Primarily, his occupation and use of the land are for his own benefit, and, in a sense, of a character adverse to that of the mortgagor.² Nevertheless, there is a *quasi* trusteeship for some purposes involved in his position.³ Thus, while he obtains the income of the property chiefly for the payment of his own debt, yet he is under a fiduciary obligation to obtain as much of such income as is reasonably possible. He is also required to make reasonable repairs, pay taxes, and, generally, to manage the property for the best interests of all parties concerned.⁴ Not only must he do this for the benefit of the owner of the equity of redemption, but also for that of subsequent lienors or encumbrancers. And the latter can hold him responsible in damages, if he fail to make a reasonable use of the property for the extinguishment of his own claim and the consequent furtherance of their interests.⁵

Not being in any technical sense a trustee, however, a mortgagee in possession may purchase an outstanding title or encumbrance and hold it against the mortgagor and all other

¹ Brady v. Waldron, 2 Johns. Ch. (N. Y.) 148; Van Pelt v. McGraw, 4 N. Y. 110; Guernsey v. Wilson, 134 Mass. 482; Jackson v. Turrell, 39 N. J. L. 329; Hager v. Brainerd, 44 Vt. 294; 2 Wash. R. P. (6th ed.) §§ 1065-1067.

² Peugh v. Davis, 113 U. S. 542; Hubbell v. Moulson, 53 N. Y. 225; Mills v. Mills, 115 N. Y. 80, 85; Brown

v. South Boston Sav. Bk., 148 Mass. 300; Thomas, Mort. §§ 246-250.

³ Ibid.; Jones, Mort. § 712.

⁴ Ten Eyck v. Craig, 62 N. Y. 406; Woodlee v. Burch, 43 Mo. 231; Morgan v. Morgan, 48 N. J. Eq. 399; Murdock v. Clarke, 90 Cal. 427; Jones, Mort. §§ 714, 715.

⁵ Demarest v. Berry, 16 N. J. Eq. 481; Thomas, Mort. § 251.

parties in interest.¹ He can not, however, legally go to the extent of allowing the property to be sold for taxes because of his own failure to pay them, and then purchase the land for his own benefit.² He must faithfully use the property so that it may fairly and as far as possible work out its own redemption; but this does not preclude his dealing with other interests therein as an outside and independent party.³

§ 475. **Repairs and Improvements by Mortgagee in Possession.** — When occupying the property and receiving the rents and income, the mortgagee must ordinarily apply them, first, to the making of necessary repairs upon the premises; second, to the payment of taxes (including water rents); third, to the liquidation of interest on the mortgage debt; and, fourth, to the discharge of the principal of that debt.⁴ He is not required to make any repairs except such as are reasonably necessary. And, if the mortgagor fail to keep the building insured, the mortgagee may include in the general expenditures, before taxes are paid, the amounts required for premiums upon the proper insurance.⁵

A mortgagee in possession may also apply the income of the land to the making of such improvements as are fairly and properly requisite to his enjoyment and beneficial use of the property. And he may charge the expenses of such improvements as practically a part of what is expended for repairs.⁶ If he go beyond what is thus fairly required and make additional improvements on the land, he does so at his own peril, since he can not charge the cost thereof against the mortgagee in case the latter redeems. The restriction, in this particular, of a mortgagee in possession has always been carefully enforced in equity, because otherwise, as it is said, he might "improve the mortgagor out of his equity of redemption." That is, if this power to charge improvements against the mortgage debt were not carefully hedged about, he might add so much value to the property as to preclude a mortgagor of moderate means from ever being able to redeem.⁷ This rule against improving

¹ *Trimm v. Marsh*, 54 N. Y. 599, 607; *Kennedy v. De Trafford* (1896), 1 Ch. 762.

² *Thomas*, Mort. § 243.

³ *Jones*, Mort. §§ 712-715.

⁴ *Wilson v. Cluer*, 3 Beav. 136; *Reed v. Reed*, 10 Pick. (Mass.) 398; *Hugly Mfg. Co. v. Galetton Mills*, 36 U. S. C.

C. A. 236; *Story's Eq. Jur.* § 1016; 2 Wash. R. P. (6th. ed.) §§ 1158-1163.

⁵ *Nichols v. Baxter*, 5 R. I. 491; *Slee v. Manhattan Co.*, 1 Paige (N. Y.), 81; *Harper v. Ely*, 70 Ill. 581; *Jones*, Mort. § 417.

⁶ *Jones*, Mort. §§ 1126-1128.

⁷ *Moore v. Cable*, 1 Johns. Ch. (N. Y.)

the mortgagor out of his equity of redemption must be understood, however, as a pure equity; and, therefore, it is ordinarily held that it must give way when such equity does not really exist, or when the justice of the matter is in favor of the mortgagee. Thus, when a purchaser at a foreclosure sale has become a mortgagee in possession as to a subordinate lienor not made a party to the action, and, believing himself to be the absolute and indefeasible owner of the land, has made valuable improvements thereon, it is held in most states that such subsequent lienor can not redeem the property without making equitable compensation for the additions thus made in good faith.¹

§ 476. **Doctrine of Annual Rests.**—A mortgagee in possession must account for the net income over and above the expenditures properly made therefrom, as above explained. He must, as heretofore stated, apply such net income, after paying for repairs and taxes, toward the discharge of, first, the interest, and then, the principal of the mortgage debt. But, since he is frequently required to receive the rents and profits of the land in small amounts, at numerous times, it would often be burdensome and unjust to compel him to account for such insignificant sums as though they had been applied as fast as received. In his accounting, therefore, he is entitled to make annual rests—and in some jurisdictions this is required to be semi-annual—and thus at regular intervals to apply the accumulated receipts in the manner here specified.²

A mortgagee out of possession is under no obligation, not expressly assumed, to receive any amount of the mortgage debt other than the whole sum due at the time.³ If, therefore, he accept payments at various times and in small amounts, he must apply the same as fast as received to the satisfaction of the interest and principal of the mortgage debt, and he does not have the benefit of the doctrine of annual rests. But a mortgagee in possession has no such option of insisting on

385; *Mickles v. Dillaye*, 17 N. Y. 80, 83; *Fletcher v. Bass Riv. Sav. Bk.* 182 Mass. 5; *Wells v. Van Dyke*, 109 Pa. St. 330; *Horn v. Indianapolis Nat. Bk.*, 125 Ind. 381; *Malone v. Roy*, 107 Cal. 518; *Thomas*, Mort. §§ 253, 254; *Jones*, Mort. § 1127.

¹ *Town of Brighton v. Doyle*, 64 Vt. 616; *Mickles v. Dillaye*, 17 N. Y. 80; *McSorley v. Larissa*, 100 Mass. 270;

Millard v. Truax, 73 Mich. 381; *Jones*, Mort. § 1128.

² *Shaeffer v. Chambers*, 6 N. J. Eq. 548; *Van Vronker v. Eastman*, 7 Met. (Mass.) 157; *Gibson v. Crehore*, 5 Pick. (Mass.) 146; *Moshier v. Norton*, 100 Ill. 63; *Adams v. Sayre*, 76 Ala. 509; *Jones*, Mort. 1139, 1140.

³ § 489, *infra*.

payment in one lump sum. He must obtain the income in the best and most reasonable manner, and therefore it is eminently fair that he should enjoy the benefit of annual rests.¹

§ 477. **Accounting by Mortgagee** — When the mortgage is redeemed or foreclosed, in computing the amount due to the mortgagee he must account for all the income received as above explained. Tersely stated, his account consists of a credit side, which embraces the principal, accrued interest, costs, and necessary expenses actually paid by him; and a debit side, in which he charges himself with all receipts on account of the debt, including all income received from the property, less proper expenditures made for repairs, necessary improvements, taxes, and running expenses.²

§ 478. **Reciprocal Rights and Duties of Mortgagee and Lessee of the Same Property.** — Important questions frequently arise from adverse claims of mortgagees and lessees. Primarily, a mortgagee, since he is not usually entitled to possession, has nothing to do with the rents or income of the land. He can not, for example, require the mortgagor to account for rents received during the running of the mortgage debt, unless the latter has taken from him a lease of the land. But, as between a mortgagee and a lessee, the former is sometimes entitled to the control of the land and the income therefrom in preference to the latter. The contentions between these parties, and their results, may be summarized as follows:

§ 479. **Such Rights and Duties when the Mortgagee has no Right of Possession.** — (a) In the ordinary case, where the mortgagee is not entitled to possession of the land, he has no right or interest, at least before foreclosure, against a lessee whose lease is *prior* to the mortgage. But in this case, if the mortgage be foreclosed after the law day, and the property be sold subject to the lease, — and this is the only way it can be sold unless the lessee consents to have it conveyed clear of his interest, — the purchaser at the foreclosure sale becomes the landlord of the lessee, and, on serving due notice upon the latter, obtains the right to subsequent rent from him, and all the rights and privileges of a landlord against him.³

(b) When, on the other hand, the mortgage which carries with it no right to possession is *first* made, and a lease is sub-

¹ Last two preceding notes.

³ *Moss v. Gallimore*, 1 Doug. 279;

² *Thomas*, Mort. §§ 245-264; 2 *Jones*, Mort. §§ 771, 772, 774.
Wash. R. P. (6th ed.) §§ 1148-1163.

sequently given by the mortgagor to a lessee who has notice of the mortgage, and the latter takes possession of the land; while the mortgagee can not disturb him until foreclosure, yet, when the mortgage is properly foreclosed and he is duly made a party to the action, his rights as lessee are barred and foreclosed. Only by a new contract between him and the purchaser at the foreclosure sale can he then legally retain possession under his lease.¹ (a)

§ 480. **Such Rights and Duties when the Mortgagee has Right of Possession.** — (c) A mortgage whose owner may take possession of the land confers upon him no right to eject a tenant who is holding under a *prior* lease. But the mortgagee, on duly notifying the lessee of his rights, becomes to all intents and purposes the landlord.² And on foreclosure of the mortgage, if the term of the lease be still running, the purchaser becomes the landlord of the tenant with all the rights and privileges incident thereto.³

(d) Lastly, if the mortgage carrying with it to the mortgagee the right of possession be made *before* the lease, the lessee may be ejected by the mortgagee, since the right of the latter to occupy the land is paramount.⁴ The tenant (as-

(a) In New York, this is one of the cases in which an attornment is still recognized. The tenant, being shut out by the foreclosure, may attorn to the purchaser, if they so choose, by virtue of the statute which declares that: "The attornment of a tenant to a stranger is absolutely void, and does not in any way affect the possession of the landlord unless made either: 1. With the consent of the landlord; or, 2. Pursuant to or in consequence of a judgment, order, or decree of a court of competent jurisdiction; or, 3. *To a mortgagee, after the mortgage has become forfeited.*" Real Prop. L. § 199, originally 1 R. S. 744, § 3; *National Bank v. Levy*, 127 N. Y. 549; *Austin v. Ahearne*, 61 N. Y. 6; *O'Donnell v. McIntyre*, 118 N. Y. 156; *McGregor v. The Board of Education*, 107 N. Y. 511; *Fletcher v. McKeon*, 71 App. Div. 278; *Thomas, Mort.* § 1026; *Taylor, Landl. & T.* §§ 121, 442.

¹ *Jones v. Clarke*, 20 Johns. (N. Y.) 51; *National Bk. v. Levy*, 127 N. Y. 549; *Thomas, Mort.* § 1026; *Jones, Mort.* § 776. And, if during foreclosure the mortgagee have a receiver appointed, the latter may collect rent from the tenant for the time of the receivership, although the tenant with notice of the mortgage may have paid for the same time *in advance* to the mortgagor. *Fletcher v. McKeon*, 71 N. Y. App. Div. 278.

² *Rogers v. Humphreys*, 4 Adol. &

El. 299; *Moss v. Gallimore*, 1 Doug. 279; *Mirick v. Hoppin*, 118 Mass. 582; *Kimball v. Lockwood*, 6 R. I. 138; *Collins v. Moore*, 115 Ga. 327; 4 Kent's Com. p. *165.

³ Last preceding note but one.

⁴ *Thunder v. Belcher*, 3 East, 449; *Keech v. Hall*, 1 Doug. 21; *Lane v. King*, 8 Wend. (N. Y.) 584; *Tarbell v. West*, 86 N. Y. 280; *Stedman v. Gassett*, 18 Vt. 346; *Gartside v. Outley*, 58 Ill. 210; *Comer v. Sheehan*, 74 Ala. 452; *Jones, Mort.* § 778.

suming, of course, that he becomes such with due notice of the mortgage) has no right to possession which he can enforce against the mortgagee. Neither is there any privity between him and the mortgagee. The mortgagee can not treat him as his own tenant against his will. If the tenant choose to stand on his technical rights and not attorn to the mortgagee, the latter must choose either to eject him or to allow him to remain in possession, paying rent and rendering all services and requirements as tenant to the mortgagor as landlord.¹ But, since the mortgagee may eject him, if the tenant desire to remain as such, he may attorn to the mortgagee, the latter consenting, and thus the relation of landlord and tenant may be established between them.² If the mortgagee choose to let the lessee remain in undisturbed possession (without any attornment) during the running of the mortgage, and after that desire to remove him from the land, he may, by properly making him a party on foreclosure, bar all his rights and interests in the property.

§ 481. **Adverse Claims of Mortgage and Dower.** — In most jurisdictions, the following classes of mortgages and no others take precedence of the claim of a wife or widow for dower, namely: (a) Those which were made and became liens on the land before the marriage of her who demands dower in it as the property of her husband;³ (a) (b) Those which

(a) The New York statute, declaratory of the common law, says: "Where a person seized of an estate of inheritance in lands, executes a mortgage thereof, before marriage, his widow is, nevertheless, entitled to dower of the lands mortgaged, as against every person except the mortgagee and those claiming under him." Real Prop. L. § 172, originally 1 R. S. 740, § 4; *Coles v. Coles*, 15 Johns. 119; *Smith v. Gardner*, 42 Barb. 356; *Brackett v. Baum*, 50 N. Y. 8; *Kursheedy v. Union Dime Sav. Inst.*, 118 N. Y. 358.

¹ *Towerson v. Jackson* (1891), 2 Q. B. 484; *Teal v. Walker*, 111 U. S. 242; *McKircher v. Hawley*, 16 Johns. (N. Y.) 289; *Massachusetts H. L. Ins. Co. v. Wilson*, 10 Met. (Mass.) 126; *Hogsett v. Ellis*, 17 Mich. 351; *Jones, Mort.* § 777.

² *Ibid.*; *Sanderson v. Price*, 21 N. J. L. 637; *Adams v. Bigelow*, 128 Mass. 365; *Jones v. Clarke*, 20 Johns. (N. Y.) 51. Such attornment is not a disputing of the landlord's title, but a justifying of his possession under it. Since the landlord has given the mortgagee right to possession, practically the attornment

is "with the consent of the landlord." *Jones, Mort.* § 777; N. Y. L. 1896, ch. 547, § 194. The attornment may be evidenced by any acts which show an intent to make the relation of landlord and tenant between the mortgagee and lessee, such as receipt and payment of rent, new stipulations as to its amount, etc. *McCormick v. Knox*, 105 U. S. 122; *Weld v. Sabin*, 20 N. H. 533; *Gartside v. Outley*, 58 Ill. 210. But see *Towerson v. Jackson* (1891), 2 Q. B. 484.

³ *Coles v. Coles*, 15 Johns. (N. Y.)

were liens on the land when it was acquired by the husband ;¹ (c) Those which were given by the husband, when he bought the property, in whole or part payment of the purchase money ;² (b) and (d) Those made by the husband or his successors in interest, in which the wife voluntarily joined for the purpose of releasing her dower, or in favor of the holders of which she voluntarily gave in any manner a release of her dower rights, or estopped herself to deny the existence of such a release.³ The full discussion of the controversies that may arise between mortgagees and women who claim dower in the mortgaged property belongs to the chapters on dower. But, in summary, it may be said here that the mortgagee prevails in either of the four cases stated, and in all other instances the rule in most places is that the demand for dower must be first satisfied.

§ 482. **Adverse Claims of Mortgagee and Other Lienors.** — The reciprocal rights and duties of mortgagees and lessees and those of mortgagees and claimants of dower present the chief instances in which the mortgagee comes into conflict with other encumbrancers of the property, except those cases which are affected, necessarily, by the recording acts. The questions of priority, therefore, between mortgagees and other lienors are more properly discussed hereafter in dealing with the general topic of priority and registry of mortgages.⁴

Interest, Rights and Duties of Mortgagor.

§ 483. **General Nature of his Interest — Conveyance Theory.** — Where the mortgage is treated as a conveyance of the land,

(b) The New York statute declares that: "Where a husband purchases lands during the marriage, and at the same time mortgages his estate in those lands to secure the payment of the purchase-money, his widow is not entitled to dower of those lands, as against the mortgagee or those claiming under him, although she did not unite in the mortgage. She is entitled to her dower as against every other person." Real Prop. L. § 173, originally 1 R. S. 740, § 5. See *Boies v. Benham*, 127 N. Y. 620, 624; *Brackett v. Baum*, 50 N. Y. 8; *Campbell v. Ellwanger*, 81 Hun, 259.

319; *Kursheedy v. Union Dime Sav. Inst.*, 118 N. Y. 358.

¹ *Ibid.*

² *Stow v. Tift*, 15 Johns. (N. Y.) 458; *Mills v. Van Voorhies*, 20 N. Y. 412; *Boies v. Benham*, 127 N. Y. 620, 624; *Hinds v. Ballou*, 44 N. H. 619; *Jones v. Parker*, 51 Wis. 218. And, in a number of states, this is expressly

declared by statute. N. Y. L. 1896, ch. 547, § 173; 1 Jones, Mort. (3d ed.) p. 371, note 1.

³ *Durnherr v. Raw*, 135 N. Y. 219, 222; *Nelson v. Brown*, 144 N. Y. 384, 389; *Purdy v. Coar*, 109 N. Y. 448; *Boorum v. Tucker*, 51 N. J. Eq. 135.

⁴ §§ 510, 511, *infra*.

carrying, as it does, the legal title to the mortgagee, only an equitable interest is left in the mortgagor.¹ This is true, however, simply as between the parties to the transaction. As to outside third parties, the mortgagor is ordinarily treated as still the legal owner. And, therefore, in an action of ejectment by him against one wrongfully in possession, the latter can not successfully defend by setting up the title of the mortgagee.²

It was early settled that the mortgagor, even under this conveyance theory, has left to him an estate, — an *equitable estate*.³ This he may sell or sub-mortgage; it is descendible to his heirs, and is devisable.⁴ The right of curtesy exists in it, and now in England, and generally in the country where this theory of the mortgage prevails, the right of dower also attaches to the mortgagor's interest.⁵ This estate is also liable for his debts. And while at common law it could not be reached by execution, yet in many states to-day it may be so reached.⁶ Where this can not be done, a creditor's bill, to have it applied to the payment of debt, will lie in equity.⁷

§ 484. **Mortgagor's Interest — Lien Theory.** — In those jurisdictions in which a mortgage gives only a lien to the mortgagee, the interest of the mortgagor remains a legal estate until foreclosure proceedings are complete.⁸ It is to be treated, therefore, as any other legal interest, with the only qualification that it must be dealt with as subordinate to the mortgage. Subject to that lien, it may descend to the mortgagor's heirs or be devised or granted away; and the ordinary incidents of curtesy, dower, and liability for debts exist therein. While this interest is usually called an equity of redemption, yet, as was above pointed out, this is a misnomer. It is to be thought of and dealt with from the proper legal standpoint as an ordinary interest in land, cognizable in both law and equity, but simply held and dealt with subject to the mortgage lien.⁹

¹ § 460, *supra*.

² *Savage v. Dooley*, 28 Conn. 411; *Porter v. Hubbard*, 134 Mass. 233.

³ Co. Lit. 205 a; Digby, *Hist. Law R. P.* (5th ed.) p. 286; *Jackson v. Willard*, 4 Johns. (N. Y.) 42; *Willington v. Gale*, 7 Mass. 138.

⁴ *Casborne v. Scarfe*, 1 Atk. 303; *Clark v. Regburn*, 8 Wall. (75 U. S.) 318; *White v. Rittenmyer*, 30 Iowa, 268; *Chamberlain v. Thompson*, 10 Conn. 243; 4 Kent's Com. pp. *158–*160.

⁵ *Hart v. Chase*, 46 Conn. 207; *Gate-*

wood v. Gatewood, 75 Va. 407; § 481, *supra*.

⁶ *Forth v. Norfolk*, 4 Madd. 503; *Van Ness v. Hyatt*, 13 Pet. (38 U. S.) 294; *Wiggin v. Heywood*, 118 Mass. 514; *Lord v. Crowell*, 75 Me. 399; 2 Wash. R. P. (6th ed.) §§ 1094, 1095.

⁷ *Bispham's Prin. Eq.* §§ 526, 527.

⁸ § 461, *supra*.

⁹ *Kortright v. Cady*, 21 N. Y. 343; *Trimmm v. Marsh*, 54 N. Y. 599; *Lilly v. Dunn*, 96 Ind. 220; *Kline v. McGuckin*, 24 N. J. Eq. 411; *Thomas, Mort.* § 23.

§ 485. **Mortgagor's Interest — Combination Theory.** — In those states in which a mortgage is at first a lien, and then after the law day in effect a conveyance, it follows from the above discussion that the mortgagor's interest is a legal estate until the law day, and an equitable one after that time. And his rights, duties, and interests are readily ascertainable from the preceding discussion, according to the time at which they are sought to be determined.¹

§ 486. **Right to Redeem.** — Before and on the law day, the mortgagor's privilege of redeeming is a legal right. And such is its nature in many jurisdictions, where the mortgage is only a lien, even after the passing of that day. But, as heretofore explained, after the law day the right to regain the land from the mortgagee is the special favor to the mortgagor invented and always very carefully fostered by the courts of equity.² It has been in those courts especially that jealous watchfulness has matured and perfected this right, and guarded it against encroachments and destruction. The important inquiries suggested by its existence are, who has the right to redeem, within what time redemption may be had, how much must be paid in order to redeem, and how the right may be enforced in case the mortgagee attempt to violate or ignore it? These questions are to be answered in the order in which they are here stated.

§ 487. **Who may redeem.** — The mortgagor and all persons owning interests in the property subordinate to the mortgage, who are in privity with the mortgagor, that is, whose rights accrue from mutual or successive interests arising from him, are entitled to redeem the property from the mortgage debt. Or, another way to state it, in summary, is that any one may redeem who has in the land an interest or right which could be barred or shut off by a proper foreclosure of the mortgage.³ Such persons include a mortgagor, his vendee, subordinate mortgagee's or lienors, sureties for the mortgage debt, one entitled to dower or curtesy in the land subordinate to the mortgage, and one who for value has assumed and agreed to pay the mortgage debt.⁴ But mere volunteers or strangers to

¹ Last five preceding notes.

² § 437, *supra*; § 491, *infra*.

³ *Grant v. Doane*, 9 Johns. (N. Y.) 611; *Averill v. Taylor*, 8 N. Y. 44; *Platt v. Squire*, 12 Met. (Mass.) 494; *Frisbie v. Frisbie*, 86 Me. 444; *Powers*

v. Golden Lumber Co., 43 Mich. 468; *Gordon v. Smith*, 62 Fed. Rep. 503; 4 Kent's Com. p. *462; *Thomas, Mort.* § 675; *Jones, Mort.* §§ 1055-1069.

⁴ *Haines v. Beach*, 3 Johns. Ch. (N. Y.) 460; *Brainard v. Cooper*, 10

the mortgage transaction have no right to redeem.¹ Thus, the mortgagor's creditors, who have not reduced their claims to judgments, and so have not obtained any liens on the land, are not entitled to redeem; but, after their judgments are obtained and they become lien creditors subordinate to the mortgage, this right then belongs to them.² When an interest in the property is held by a trustee, he and not the *cestui que trust* is the proper person to redeem.³

§ 488. **During what Time the Right to redeem exists.** — There is no right to redeem from the mortgage before the law day, unless the mortgagee is willing to accept payment and relinquish his security. Having made his investment with a view of retaining it until that day, no one has any right to deprive him thereof without his consent. The absolute right of redemption, therefore, accrues on the law day.⁴ And it continues until the mortgage is discharged, or foreclosure proceedings are complete.⁵ And the general rule is that foreclosure is not ended, and the right to redeem is not terminated, until the sale of the property pursuant to the judgment is concluded. In some states, however, by statute, the privilege of redeeming is extended to a designated time after the sale of the property on foreclosure. Thus, in Minnesota, Michigan, and Wisconsin, the time is one year after the sale; and in several states, such as Iowa, Kansas, and Colorado, it is the same time as that permitted by their statutes for redemption of real property sold on execution.⁶

§ 489. **Amount paid to redeem.** — In the absence of positive agreement by the mortgagee, and when he has not taken possession of the land, he can not be required to accept for the purpose of redemption any payment less than the whole amount due on the mortgage, including interest, expenses

N. Y. 356; Wood v. Goodwin, 49 Me. 260; Hunter v. Dennis, 112 Ill. 568; Gibson v. Crehore, 5 Pick. (Mass.) 145; Vaughan v. Dowden, 126 Ind. 406.

¹ Grant v. Doane, 9 Johns. (N. Y.) 591; Sinclair v. Learned, 51 Mich. 335; Story's Eq. Jur. § 1023; Jones, Mort. § 1055.

² Grant v. Doane, 9 Johns. (N. Y.) 591; Brainard v. Cooper, 10 N. Y. 356; Lomax v. Bird, 1 Vern. 182; Story's Eq. Jur. § 1023.

³ Dexter v. Arnold, 1 Sumn. (U. S. Cir. Ct.) 109.

⁴ Brown v. Cole, 14 Sim. 427; Missouri K. & T. Co. v. Union Trust Co., 87 Hun (N. Y.), 377; Jones, Mort. § 1052.

⁵ Nutt v. Cuming, 155 N. Y. 309; Bernard v. Jersey, 39 N. Y. Misc. 212; Hull v. McCall, 13 Iowa, 467; Heimbarger v. Boyd, 18 Ind. 420; Jones, Mort. § 1052. See Collinson v. Jeffery (1896), 1 Ch. 644.

⁶ 1 Stim. Amer. St. L. §§ 1940-1948; § 562, *infra*.

properly chargeable, and costs.¹ This is true though the debt or claim has passed to another party, or has become barred by the Statute of Limitations, or though the land has been sold for less than the amount of the mortgage.² This right of the mortgagee to insist on payment in full prevails against any party seeking to redeem, although the latter may have only a small interest in or lien against the land. Thus, a part owner, a second mortgagee, or a claimant of dower subordinate to the mortgage must comply with this privilege of the mortgagee, in the same manner as must the mortgagor himself.³ But, when one who is not obligated to pay the whole mortgage debt redeems by paying that amount, he has the right to contribution, or subrogation, or exoneration, or two or all of these remedies, for his reimbursement, in the manner explained hereafter.⁴

To this general requirement of payment in full, as a prerequisite to redemption, there are, however, a few exceptions and qualifications. It may, for example, be waived by the mortgagee.⁵ And, when there are several mortgagors and the mortgage debt is barred as to some of them, but not as to others, those who remain obligated have a right to redeem by paying their proportionate shares.⁶ So, if the mortgagee himself become the owner of a part interest in the equity of redemption, his mortgage is equitably satisfied to that extent, and the other part owners of the land have a right to redeem their interests by together paying their *pro rata* share of the original debt.⁷ Again, where it would give an unjust advantage to a mortgagee and injuriously affect him who redeems to compel him to pay the entire mortgage, as for example where the mortgagee has colluded with others unfairly to deprive him of a part of the land originally covered by the mortgage, he may redeem by paying as much as is fairly and equitably due to the wrongdoing mortgagee.⁸ The courts have worked out such results as these in pursuance of their determi-

¹ Collins v. Riggs, 14 Wall. (81 U. S.) 491; Coffin v. Parker, 127 N. Y. 117, 121; Aiken v. Gale, 37 N. H. 501; Meacham v. Steele, 93 Ill. 135; Lamb v. Montague, 112 Mass. 352; Pom. Eq. Jur. § 411.

² Ibid.

³ Palk v. Clinton, 12 Ves. 59; Bell v. City of N. Y., 10 Paige (N. Y.), 49; Merselis v. Van Riper, 55 N. J. Eq.

618; Thomas, Mort. § 680; Jones, Mort. § 1070.

⁴ §§ 502-504, *infra*.

⁵ Mutual Life Ins. Co. v. Kirchoff, 133 Ill. 368.

⁶ Fogal v. Pirro, 17 Abb. Pr. (N. Y.) 113.

⁷ Dooley v. Potter, 140 Mass. 49.

⁸ Coffin v. Parker, 127 N. Y. 117.

nation to keep the equity of redemption on a purely equitable basis.¹

§ 490. **Suit to redeem.—Other Similar Proceedings.**—In the practice of the English courts of equity, whenever the mortgagee refused after the law day to accept payment of his debt in full and discharge the mortgage, a bill or petition to compel him to do so was sustained. The basis of this equitable remedy was the recognition of the mortgagee as the holder of the legal title, and of the mortgagor as having nothing but an equity and possessing no legal right to regain his property after the law day. Originating, however, from this principle, such a suit has continued to be favored in all jurisdictions, including those in which the mortgage has developed into a mere lien.² Nevertheless, in states of the latter theory, a proper legal tender after the law day divests the mortgagee of his lien, and if he be not in possession, and the mortgage be not recorded, this affords full and adequate defence to the mortgagor.³ When the mortgagee is in possession and his lien has been thus divested, the mortgagor may, it seems, have ejectment against him at law.⁴ And when the mortgage is recorded, an action against the mortgagee to have it cancelled of record may be sustained on the strength of a proper tender, validly made and subsequently kept good.⁵ Therefore, in the lien-theory states, while a suit to redeem is possible and is sometimes brought, there is not frequently any real requirement for its existence.⁶ (a)

§ 491. **Importance of Right to redeem.**—The right of redemption is equity's favorite child. It has been fostered and

(a) In New York, "An action to redeem real property from a mortgage, with or without an account of rents and profits, may be maintained by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises, for twenty years after the breach of the condition, or the non-fulfilment of a covenant therein contained." Code Civ. Pro. § 379; *Mooney v. Byrne*, 163 N. Y. 86, 98; *Shriver v. Shriver*, 86 N. Y. 575; *Campbell v. Ellwanger*, 81 Hun, 259.

¹ *Hannah v. Davis*, 112 Mo. 599; *Jones, Mort.* § 1076; 4 *Kent's Com.* p. *163.

² *Thomas, Mort.* §§ 699, 700.

³ § 523, *infra*.

⁴ *Thomas, Mort.* § 701, citing *Ed-*

wards v. Farmers F. I. & L. Co., 21 *Wend. (N. Y.)* 467.

⁵ See this more fully explained, § 523, *infra*.

⁶ For proceedings in redemption suit, see *Thomas, Mort. ch. xix.*; *Jones, Mort.* §§ 1093–1113.

cared for with jealous anxiety. And the mortgagor will not be permitted, when he makes the mortgage, to contract it away, or otherwise to divest himself of this important privilege. The maxim, "Once a mortgage, always a mortgage," is the terse expression of this emphatic equitable principle.¹ "You shall not," said Lord Eldon, speaking of the mortgage in the case of *Seton v. Slade*,² "alter by special terms what this court says are the special terms of that contract." Such expressions as this mean that a mortgage transaction is *sui generis*, in that the parties to it can not inject into it, at the time when it is made, anything that by its own operation can cause the mortgage to develop into anything else. A lease may be made to include a provision that, on the happening of certain stipulated conditions subsequent, it shall become a deed of conveyance in fee simple. Or a contract of sale of real property may be so worded that without further agreement it shall become a lease, a mortgage, or a deed of conveyance. But when a mortgage is made, any attempt to give to it a self-changing characteristic, or the capability of becoming a different contract by the happening of subsequent events, is a nullity. In that transaction, the mortgagor can not sell, nor encumber, nor impair in any manner his equity of redemption. He can not make a mortgage that does not have incident to it the equity of redemption, and he can not, when making the mortgage, enter into any agreement that shall take away or clog that incident.³ This is the safeguard that the courts of equity, treating him as being at a disadvantage, have thrown around the mortgagor. Needing the money which the mortgage may bring to him, he would often be imposed upon by the mortgagee, but for this absolute and unalterable rule of equity.⁴

It must be understood, however, that what is said in the preceding paragraph applies primarily to the transaction in which the mortgage is brought into being. After the land-

¹ *Newcomb v. Bonham*, 1 Vern. 7; *Marquess of Northampton v. Pollock*, L. R. 45 Ch. Div. 215; *Noakes v. Rice* (1902), App. Cas. 24; *Bispham's Prin. Eq.* § 153.

² 7 Ves. 273.

³ Last two preceding notes; *Jarrah Timber & Wood Paving Corp. v. Samuel* (1903), 2 Ch. 1; *Peugh v. Davis*, 96 U. S. 332; *Mooney v. Byrne*, 163 N. Y.

86, 92; *Hughes v. Harlam*, 166 N. Y. 427; *Bayley v. Bailey*, 5 Gray (Mass.), 505; *Hyndman v. Hyndman*, 19 Vt. 9; *Sweet v. Parker*, 22 N. J. Eq. 453; *Turpie v. Lowe*, 114 Ind. 37; *Jackson v. Lynch*, 129 Ill. 72; *Bradbury v. Davenport*, 114 Cal. 593.

⁴ *Ibid.*; 3 Pom. Eq. Jur. § 1193; *Bispham's Prin. Eq.* §§ 153, 154.

owner has obtained the mortgage money, and delivered the instrument to the mortgagee, the parties by a new contract may cancel the mortgage in whole or in part, or the mortgagee may purchase the equity of redemption from the mortgagor, or they may enter into new agreements further encumbering or restricting that equity.¹ So, of course, after the law day, the mortgage may be foreclosed, and all rights of the mortgagor thereby barred and destroyed. The maxim "Once a mortgage, always a mortgage," has no application to such subsequent transactions as these, when conducted fairly and in good faith. It simply means that a mortgage shall not be originated with an inherent tendency to become an absolute deed of conveyance, a lease, or any other form of grant, lien, or contract.

§ 492. **Special Mortgage Clauses.** — From the time of the creation of the right to redeem, and the adoption of the maxim "Once a mortgage, always a mortgage," lenders of money on such securities as these have frequently endeavored to violate the principle expressed by that maxim. Such attempts have been uniformly and with complete success frustrated by courts of equity, and, in more recent times, by courts of law as well.² Yet mortgagees, while yielding to the force of this principle, have been enabled, from time to time, to weave clauses into the mortgage document, which do not violate that maxim, and yet are of great utility to them in preserving and enforcing their rights against the borrowers and the properties. The most important of such clauses are the power of sale clause, the interest clause, the tax and assessment clause, the insurance clause, the receiver's clause, the gold clause, and a clause relative to the effects that may be produced upon the rights of the parties by subsequent tax legislation. These clauses are to be next explained in the order mentioned.

§ 493. **Power of Sale.** — A very common clause in a mortgage is one providing that, on the maturity of the debt, the mortgagee shall have the power to sell the property, and that, after reimbursing himself out of the proceeds, he shall return any surplus to the mortgagor or to his successor in interest.³

¹ *Réeve v. Lisle* (1902), App. Cas. 461; *Russell v. Southard*, 12 How. (53 U. S.) 139, 154; *Harrison v. Trustees of Phillips Academy*, 12 Mass. 456; *Odell v. Montross*, 68 N. Y. 499; *Kreamer v. Adelsberger*, 122 N. Y. 467;

De Lancey v. Finnegan, 86 Minn. 255; *Wilson v. Vanstone*, 112 Mo. 315; *Thomas*, Mort. §§ 30, 678.

² *Ibid.*

³ *Bell Mining Co. v. Butte Bank*, 156 U. S. 470, 477; *Elliott v. Wood*, 45

In executing this power, the creditor acts in a fiduciary capacity and is governed generally by the rules and principles which control the actions of trustees.¹ Therefore, he can not validly purchase at his own sale without permission of the court; he must use all reasonable means to make the property bring the highest possible price, and he must act in disposing of it for the best interest of the mortgagor.²

Since a power of this kind is usually coupled with an interest, it is not, as a general rule, extinguished by the death of its creator.³ In many common-law jurisdictions, it has been held assignable and capable of passing with an ordinary transfer of the mortgage.⁴ Its assignability, however, when it is not made to the mortgagee "and his assigns," has been denied in other jurisdictions.⁵ And, in still others, this matter is settled by statute, in effect like that of New York, which provides that "where a power to sell real property is given to a mortgagee, or to a grantee in any other conveyance intended to secure the payment of money, the power is deemed a part of the security, and vests in, and may be executed by any person who, by assignment or otherwise, becomes entitled to the money so secured to be paid."⁶

The power of sale in a mortgage is, of course, entirely incidental to the existence of the mortgage debt. Therefore, the extinguishment of that debt terminates the power, and an attempted subsequent execution thereof is a nullity.⁷ (a)

(a) In the New York short form of mortgage, this covenant is: "That the said party of the first part will pay the indebtedness as hereinbefore provided, and if default be made in the payment of any part thereof, the party of the second part shall have power to sell the premises therein described according to law." Real Prop. L. § 223, Schedule C. And the meaning of this, as it was formerly expressed more in detail, and as ex-

N. Y. 71; *Eaton v. Whiting*, 3 Pick. (Mass.) 484; *Clark v. Condit*, 18 N. J. Eq. 358; *Thomas*, Mort. § 1100.

¹ *Ibid.*; 2 *Perry on Trusts*, §§ 602 o, 602 p.

² *Ibid.*; § 387, *supra*.

³ *Hunt v. Rousemaniere*, 8 Wheat. (21 U. S.) 174, 201; 2 *Perry on Trusts*, § 602 h. See *contra*, where the mortgage is only a lien, *Baum v. Raley*, 53 S. C. 32; *Wilkins v. McGehee*, 86 Ga. 764.

⁴ *Brown v. Smith*, 116 Mass. 108; *Sanford v. Kane*, 133 Ill. 199; *Pickett*

v. Jones, 63 Mo. 195; 2 *Perry on Trusts*, §§ 602 k, 602 n.

⁵ *Cooke v. Crawford*, 13 Sim. 98; *Chilton v. Brooks*, 71 Md. 445, 450; *Stanley v. Kempton*, 59 Me. 472; 2 *Robbins*, Mort. p. 890; *Jones*, Mort. §§ 826, 1792, 1796.

⁶ N. Y. L. 1896, ch. 547, § 126; 1 *Stim. Amer. Stat. L.* § 1871; *Waterman v. Webster*, 108 N. Y. 157, 164.

⁷ *Bunce v. Reed*, 16 Barb. (N. Y.) 347; *Beatie v. Butler*, 21 Mo. 313. See, generally, as to such powers, 2 *Wash. R. P.* (6th ed.) §§ 1003-1016.

§ 494. **Interest Clause.** — Accumulations of interest on the mortgage debt rapidly diminish the value of the equity of redemption, and thereby impair the mortgagee's security. In mortgages having several years to run, it is essential that this contingency be provided against. A very common clause, therefore, is to the effect that, if the mortgagor fail to pay any instalment of interest within a specified number of days (usually thirty) after it is due, the whole amount of the mortgage debt, principal and interest, shall thereupon, at the election of the mortgagee, become due and payable.¹ This enables the mortgage to be foreclosed for all that it secures, in case of such continued failure to pay interest. And it is generally held that, after an instalment of interest has remained due and unpaid for the specified time, the mortgagee has an absolute right to the payment of both principal and interest; and the tender thereafter of simply what is due by way of interest will not deprive him of the right to foreclose for both principal and interest.² (a)

§ 495. **Tax and Assessment Clause.** — Since taxes, assessments, water-rates, and like public charges, when they attach to the land, become liens prior to all others, and thereby endanger the mortgage security, a quite usual and beneficent clause in such instruments is to the effect that, if any public charge of this character become a lien upon the land and re-

plained in the text, is set out in Real Prop. L. § 219, subd. 2. For the similar covenant in mortgages on leaseholds, see Real Prop. L. § 237, Schedule D, as explained in § 235, subd. 1.

(a) In the New York short form of mortgage, this clause, and the tax and assessment clause explained in the following section of the text, are combined as follows: "And it is further expressly agreed that the whole of said principal sum shall become due at the option of the party of the second part after default in the payment of any instalment of principal or of interest for . . . days, or after default in the payment of any tax or assessment for . . . days after notice and demand." Real Prop. L. § 223, Schedule C. And the meaning of this, as it was formerly expressed more in detail, and as explained in the text, is set out in Real Prop. L. § 219, subd. 1. For the similar covenants in mortgages on leaseholds, see Real Prop. L. § 237, Schedule D, as explained in § 235, subd. 4.

¹ *Malcolm v. Allen*, 49 N. Y. 448; *Bennett v. Stevenson*, 53 N. Y. 508; *Noyes v. Anderson*, 124 N. Y. 175, 180; *Atkinson v. Walton*, 162 Pa. St. 219; *Baldwin v. Van Vorst*, 10 N. J. Eq. 577; *Bushfield v. Meyer*, 10 Ohio St.

334; *Curran v. Houston*, 201 Ill. 442; *Thomas, Mort.* §§ 228, 229.

² *Ibid.*; *Hothorn v. Louis*, 52 N. Y. App. Div. 218; *Rosche v. Kosmowski*, 61 N. Y. App. Div. 23; *Thomas, Mort.* § 230. See *Howell v. Western R. Co.*, 94 U. S. 463.

main unpaid for a specified number of days (usually sixty or ninety) thereafter, or after that number of days from notice to the mortgagor and demand that he pay the same, the entire amount of the mortgage debt, principal and interest, shall then, at the election of the mortgagee, become due and payable.¹ The failure to keep down these encumbrances, as required by this clause, justifies foreclosure of the mortgage in substantially the same manner and under the same conditions as those specified in the preceding paragraph.² (a)

§ 496. **Insurance Clause.**—It is generally expressly provided that the mortgagor shall keep the buildings on the property insured against loss by fire, for the benefit of the mortgagee. By the clause which effectuates this, it is stipulated either that the mortgagor shall obtain the policy of insurance in his own name, and assign it to the mortgagee, or have the insurance made payable in case of loss to the latter as his interest may appear. Or, sometimes provision is made that the mortgagor will pay the premiums to the mortgagee, who shall thereupon take out the insurance in his own name. It is usually added, in either form of stipulation, that, if the mortgagor fail to perform the provisions thereof, the mortgagee may insure in his own name, pay the premiums, and add the amount thereof to the mortgage debt. All that the mortgagee can require under such a clause as this is that the amount of insurance shall be sufficient to cover all that may grow due upon the mortgage, even though the buildings on the property may be worth materially more.³ (a)

(a) For the New York form of this clause, see the preceding section note (a).

(a) In the New York short form of mortgage, this covenant is: "That the said party of the first part will keep the buildings on the said premises insured against loss by fire for the benefit of the mortgagee." Real Prop. L. § 223, Schedule C. And the meaning of this, as it was formerly expressed more in detail, and as explained in the text, is set out in Real Prop. L. § 219, subd. 3. For the similar covenant in mortgages on leaseholds, see Real Prop. L. § 237, Schedule D, as explained in § 235, subd. 2; and see also subd. 3.

¹ Leopold v. Hallheimer, 1 N. Y. App. Div. 202; Condon v. Maynard, 71 Md. 601; Pope v. Durant, 26 Iowa, 233.

² Ibid. But foreclosure will not be permitted for a mere technical or accidental failure to pay such charges, when it is shown that the mortgagor made

payment as soon as his attention was called to the default, and the mortgagee suffered no injury from the delay. Ver-Planck v. Godfrey, 42 N. Y. App. Div. 16.

³ Thomas, Mort. § 82. Such a clause must exist, in order to require the

§ 497. **Receiver's Clause.** — The receiver's clause provides that, after default in payment on the part of the mortgagor, the mortgagee shall be at liberty, after commencing proceedings to foreclose the mortgage (and sometimes without this), and on a specified number of days' notice (usually ten), to apply to the court for and have appointed a receiver of the rents and profits, who shall manage the estate, lease, pay expenses, make repairs, etc., so that the interest of the mortgagee shall be protected. This is in itself a useful clause; but it does not supersede the general equitable principle which enables a mortgagee at any time, and without such express stipulation, on being able to show that his security is being impaired, to have a receiver appointed, who shall take possession of the property and preserve it from loss for his benefit.¹

§ 498. **Gold Clause.** — A stipulation is frequently inserted — and especially during times of financial crises, or stringency in the money market — that both principal and interest, when due, shall be payable “in gold coin of the United States of the present standard of weight and fineness.” Such a provision is more apt to exist in long mortgages than in short ones, especially when they are made in prosperous times. It is a valid stipulation, and its existence does not cause any additional encumbrance on the land.²

§ 499. **Clause Relative to Mortgage Tax Laws.** — In states in which the taxes on real property are paid in full by the mortgagor, regardless of the existence of the mortgage lien, a mortgagee rarely pays any tax on the indebtedness to himself, although in theory it may be taxable. In such states, because of agitation in favor of compelling all mortgages as such to be taxed by enabling the mortgagor to have the amount of tax upon the mortgage deducted from the tax otherwise payable by himself, a clause is frequently inserted in the instrument to the effect that, if any law be enacted giving such right or a similar one to the mortgagor, the entire mortgage debt, both principal and interest, shall then become due and payable.

mortgagor to insure for the benefit of the mortgagee; and, when it does exist, it does not constitute a covenant running with the land. *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 186 U. S. 434.

¹ *Browning v. Sire*, 56 N. Y. App. Div. 399; *Eidlitz v. Lancaster*, 40 N. Y.

App. Div. 446; *Harris v. Taylor*, 22 N. Y. App. Div. 109; *Thomas, Mort.* § 895; *Bispham's Prin. Eq.* §§ 577, 578.

² *Bronson v. Rodes*, 7 Wall. (74 U. S.) 229; *Blanck v. Sadlier*, 153 N. Y. 551; *Hartigan v. Smith*, 19 N. Y. App. Div. 173.

The enactment of such a statute would thereupon enable the mortgagee to proceed with a foreclosure suit. It is also frequently added, in this connection, that, if the amount of such a tax plus the interest stipulated for in the mortgage shall not exceed the legal rate of interest after the enactment of such a law, the mortgagor shall pay all of such tax in addition to the interest reserved in the mortgage.¹ In states which have stringent usury laws, this last clause is required to be carefully worded, so that it shall not result in any agreement for the payment of usury, growing out of the fact that the stipulated rate of interest plus the added tax may exceed the legal rate of interest. (a)

§ 500. **Covenants for Title.**—In addition to the special clauses above enumerated, mortgages frequently contain ordinary covenants for title on the part of the mortgagor, such as those of warranty, further assurance, against encumbrances, etc. These covenants operate in the mortgage in substantially the same manner as in a deed.²

(a) In New York, mortgages are *taxable*. L. 1896, ch. 908, § 3. But, because the mortgagor must pay taxes on the full assessed value of the realty regardless of the existence of the mortgage, the mortgagee in many instances is never reached by the tax-assessors. If the mortgagor could have a reduction because of the mortgage, he would uniformly claim it, and the mortgagee would then be taxed for the amount so taken from the mortgagor—as is done, for example, in New Jersey. It is to provide against the possibility of a law permitting this, and becoming operative during the life of the mortgage, that such a clause is put into mortgages in states like New York. It is familiarly known in that state as the “Brundage Clause.”

¹ When the mortgagor fails to pay taxes as his duty requires, the mortgagee may pay them and add the amount to the mortgage debt, even without the aid of any stipulation to that effect in the instrument. *Sudenberg v. Ely*, 90 N. Y. 257; *Thomas, Mort.* § 691; *Jones, Mort.* §§ 1080, 1184. But this

clause is to obviate the necessity for his continuously making such payments, and thereby endangering the security for the mortgage debt.

² *Jones, Mort.* § 68; *Thomas, Mort.* § 27; § 461, *supra*; N. Y. L. 1896, ch. 547, § 219, subd. 4.

CHAPTER XXVIII.

MORTGAGES — SPECIAL EQUITIES ASSOCIATED WITH THEM — PRIORITIES AND RECORD — DISCHARGING AND EXTINGUISHING MORTGAGES.

Special Equities associated with Mortgages.

- § 501. The four equities.
- § 502. Contribution to redeem.
- § 503. Exoneration.
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Priorities and Record.

- § 506. Priorities when mortgages are not recorded.
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- § 513. Tacking — Consolidation — Future advances — General nature of these principles.
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Discharging and Extinguishing Mortgages.

- § 517. Ways of discharging.
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- § 523. Tender of mortgage debt.
- § 524. Extinguishment, or merger.
- § 525. Extinguishment, or merger, at law.
- § 526. Extinguishment, or merger, in equity.
- § 527. New agreement, or accord and satisfaction.
- § 528. Statute of Limitations.
- § 529. Defenses against mortgages.

Special Equities associated with Mortgages.

§ 501. **The Four Equities.** — In connection with the mortgage and its payment, the four equitable rights of contribution, exoneration, subrogation, and marshalling find frequent application. A separate discussion is needed as to each of these.

§ 502. **Contribution to redeem.** — Since a mortgagee can ordinarily demand payment in full as a prerequisite to the discharge of his lien, persons frequently redeem from the mortgage by paying the entire debt, who are only part owners of the land, or who, for other reasons, are not equitably bound to bear the whole burden. He who so redeems becomes entitled to contribution from his co-obligors. This right exists, for example, against other joint debtors, or owners in common, or co-sureties, and generally against persons standing on the same plane of obligation as the party who pays the debt.¹ The right accrues in one's favor as soon as he has paid more than his share of the mortgage debt. Thus, if A, B, and C be equally obligated as co-sureties on the bond which is secured by the mortgage, A has a right of contribution against B and C as soon as he has properly paid more than his one third of the indebtedness. And he need not wait to be sued for the debt, but may pay it voluntarily, as soon as it becomes due, and proceed at once against B and C for their contributive shares.² His best course of procedure for this purpose is to sue them together in equity, since in that court he may join in one suit all who are liable to contribute, may recover contribution ratably against those of them who are solvent if some turn out to be insolvent, and, if some of them have died, he may join their executors or administrators in the one proceeding, and thus recover their proportionate shares against their estates. At law, the death of any of the co-obligors relieves his estate from the liability to contribute, the insolvency of any one of them does not increase the amount which the others must contribute, but they pay simply the proportionate parts which they are deemed to have contracted for at the outset, and each must be sued separately, thus requiring as many distinct actions as there are contributors.³ Thus, if A, B, C, and D were co-sureties, and after A had paid the debt he discovered that B was insolvent, at law he could recover only one fourth of the debt from C, and the same from D, and must sue them each separately; but in equity, in one and the same proceeding, he could recover one

¹ Whiting v. Burke, L. R. 10 Eq. 539; Ellesmere Brewery Co. v. Cooper (1896), 1 Q. B. 75; Swaine v. Perine, 5 Johns. Ch. (N. Y.) 482; Wells v. Miller, 66 N. Y. 255; Blake v. Traders' Bank, 145 Mass. 13; Brown v. Simons, 44

N. H. 475; Bispham's Prin. Eq. § 328; 3 Pom. Eq. Jur. § 1222.

² Davies v. Humphries, 6 M. & W. 153; Morgan v. Smith, 70 N. Y. 537; Stearns, Suretyship, § 286.

³ Bispham's Prin. Eq. § 329; Baylies, Sur. & Guar. pp. 317-319.

third of the debt from each of them. If, on the other hand, A found that B had died solvent, in equity, but not at law, he could recover one quarter of the debt from B's executors or administrators, thus leaving C and D each obligated for the same share (one quarter) of the amount paid by A to the creditor.¹

§ 503. **Exoneration.** — When one who is secondarily liable pays the mortgage debt or any part thereof, he is entitled to be reimbursed in full by the primary debtor; and this is the equity of exoneration. Such, for example, is the right of a surety against the mortgagor. He may pay the debt before or after its maturity, and as one lump payment or in instalments, and, as soon as it becomes mature, may have his action against the primary obligor for as much as has been so paid.² The chief qualification to this equity, which is to be noted, is that the party thus secondarily liable can not speculate in the transaction at the expense of the borrower. Therefore, if he succeed in extinguishing the debt by paying only a portion of it, or by satisfying it in depreciated currency, or by some other method advantageous to himself, he can recover against the principal debtor only the fair value of what he has himself expended, together with the costs and expenses reasonably incurred in so discharging the mortgage debt.³

§ 504. **Subrogation.** — When any obligor other than the principal debtor pays the mortgage debt, by the equity of subrogation he is entitled to the mortgage security and all other collaterals held by the creditor.⁴ In most jurisdictions, this includes also any judgment for the debt which the mortgagee may have obtained against the principal obligor.⁵ The clear equity here is that the creditor holds the mortgage and all other collaterals in a semi-trust capacity, and can not deal with them to the injury of sureties or other secondary obligors and still hold the latter fully liable for the debt. Therefore, if by

¹ Last preceding note; Stearns, Suretyship, §§ 289-294.

² *Aguilar v. Aguilar*, 5 Madd. 414; *Dowse v. Gorton* (1891), App. Cas. 190; *Galin v. Neimcewicz's Ex'rs*, 11 Wend. (N. Y.) 312; *Bispham's Prin. Eq.* § 331.

³ *Ibid.*; Stearns, Suretyship, §§ 296-300.

⁴ *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 545; *Howard v. Robbins*, 170 N. Y. 498; *Pease v. Egan*,

131 N. Y. 262; *Merchants' & Manuf. Bk. v. Cummings*, 149 N. Y. 360, 364; *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 130; *Gaskill v. Wales's Ex'rs*, 36 N. J. Eq. 527; *Beaver v. Slanker*, 94 Ill. 175; *Cockrum v. West*, 122 Ind. 372; *Bispham's Prin. Eq.* § 335.

⁵ *Prairie State Bk. v. United States*, 164 U. S. 227; *Mansfield v. Mayor*, etc. of New York, 165 N. Y. 208; *Bispham's Prin. Eq.* § 336; Stearns, Suretyship, § 266.

his negligence or wilful act he lose the mortgage security or any part of the same, or wrongfully return it to the borrower, those parties who stand in the position of sureties for the debt are released *pro tanto*.¹

Assistance may be here rendered in appreciating the three equities of contribution, exoneration, and subrogation by the following example. Suppose A to be the mortgagee, B the mortgagor, and C and D co-sureties for B. If C should pay the entire debt when due, he would have against D the right of contribution, against B that of exoneration, and against A that of subrogation.² He could not speculate in these equities, nor recover more than he himself had expended; but he could proceed with them, either successively or concurrently, until complete justice was worked out among all the interested parties as far as this could be done with the aid of a court of equity.

§ 505. **Marshalling.** — By the equitable doctrine of marshalling, funds available for the payment of two or more debts are required to be so utilized that each creditor shall share equitably therein. Thus, if A hold a mortgage on two lots of land, and B hold a subordinate mortgage on one of them, A must obtain payment of his claim from the property in such manner as to depreciate as little as possible the security for B's mortgage. Therefore, if A foreclose and proceed to sell the land, equity will either compel him to sell in the first instance that lot on which B has no claim, and to stop there if it pay A's debt; or, more commonly, will permit A to sell either lot, and, if any property remain after his claim is satisfied, will subrogate B to such surplus for the payment of his claim.³

One of the most frequent applications of the doctrine of marshalling to mortgage transactions is made in determining the order in which the various lots of land covered by a blanket mortgage on them all shall be sold to pay the mortgage debt. The three groups of cases which may thus arise may be best explained by concrete illustrations, as follows: —

(a) Suppose the mortgagor of ten lots of land, numbered from 1 to 10 consecutively, sells those numbered from 1 to 8 in

¹ Last preceding note; Sternbach v. Friedman, 34 N. Y. App. Div. 534; Stearns, Suretyship, § 274.

² Furnold v. Bank of Missouri, 44 Mo. 336.

³ *Evertson v. Booth*, 19 Johns. (N. Y.) 486, 493; *Ingalls v. Morgan*, 10 N. Y. 178, 186; *Groves v. Sentell*, 153 U. S. 465, 482; *Miller v. Cook*, 135 N. Y. 190; *Bispham's Prin. Eq.* §§ 340, 341.

that order, each to a separate purchaser, who either obtains a warranty deed or pays the purchase price of his lot in full on the faith that the blanket mortgage will be fully discharged by the mortgagor. If, now, the borrower fail to pay the debt, then, on foreclosure of the blanket mortgage, lots numbers 9 and 10 must be first sold, and if they fail to satisfy the mortgage, number 8 must be sold next, and next number 7, and so on, backwards, *in the inverse order of alienation* by the mortgagor. This is the requirement in England and in the majority of the United States.¹ And the principle on which it is based is that, if the mortgage had been foreclosed after the mortgagor had sold only one lot, i. e., number 1, the other nine lots should be disposed of before number 1 should be taken. Therefore, number 1 should be sold last for the payment of the mortgage debt; and, by a parity of reasoning, number 2 should be sold next to the last, and number 3 before number 2, and so on.²

(b) If any purchaser of one of the lots covered by a blanket mortgage assume the entire mortgage debt, and agree to pay the same as part of the purchase price of his property, or if he otherwise put himself in the position of the mortgagor, then his lot is to be first sold for the discharge of the mortgage, and if, as might sometimes happen, several of the purchasers of the lots so covered successively assume the entire mortgage obligation, or more of it than their fair shares respectively, then the equity of marshalling would require their lots to be sold in their *direct* order of alienation, i. e., in the same order in which they were respectively purchased from the mortgagor.³ This is not, of course, a common occurrence; but it exhibits the converse of the proposition explained in the preceding paragraph.

(c) Lastly, it sometimes occurs that, after executing a blanket mortgage on a number of lots of land (say ten), the mortgagor sells the lots separately to distinct purchasers, each of whom expressly takes his lot subject to, or assumes and agrees to pay, his proportionate share of the blanket mortgage.

¹ Farrington v. Forrester (1893), 2 Ch. 461; Clowes v. Dickenson, 5 Johns. Ch. (N. Y.) 235; Libby v. Tufts, 121 N. Y. 172; Rogers v. Smith, 75 N. Y. App. Div. 141; George v. Wood, 9 Allen (Mass.), 80; Sanford v. Hill, 46 Conn. 42; Thomas, Mort. § 271; Jones, Mort.

§§ 1621, 1622. See, *contra*, Dickey v. Thompson, 8 B. Mon. (Ky.) 312.

² Ibid.

³ Bonne v. Lynde, 91 N. Y. 92; Chase v. Woodbury, 6 Cush. (Mass.) 143; Cushing v. Ayer, 25 Me. 383; Tompkins v. Wiltberger, 56 Ill. 385; Jones, Mort. § 1622.

In such a case there is no special equity amongst them in case the blanket mortgage is foreclosed, and the mortgagee may sell the lots in any order that he may select. But, if the mortgage be satisfied by a sale of any number less than the ten lots, those purchasers from the mortgagor who have thus lost their properties are entitled to contribution from such purchasers whose lots are not sold on foreclosure of the blanket mortgage.¹ A case like this also arises when tenants in common or joint tenants or other co-owners of land unite in mortgaging the whole of it, share ratably in the proceeds of the mortgage, and subsequently partition the mortgaged property amongst themselves. Their equities are then equal, and neither can require that on foreclosure of the mortgage another's land shall be sold before his own. Also, the same right of contribution exists in favor of those whose lots are then taken to pay the mortgage debt.²

It is to be added that, when a blanket mortgagee who has notice of the facts and equities releases some of the lots which have passed into the possession of separate purchasers, if the equities of the lot owners are equal, as in case (c), above explained, the other lots are released from the debt *pro tanto*, that is, they can not be required to pay any more than their original proportionate share.³ If, on the other hand, the blanket mortgage cover lots amongst whose owners there exist special equities, such as those explained in cases (a) and (b) above, and the mortgagee, knowing the equities, release some of the lots primarily obligated, he may thereby discharge entirely his claim against those subordinately encumbered.⁴

Priorities and Record.

§ 506. **Priorities when Mortgages are not recorded.**—Leaving the recording acts out of view for the moment, the questions as to priority in right to payment among different mortgages

¹ Bernhardt v. Lymburner, 85 N. Y. 172; Wood v. Harper, 9 N. Y. App. Div. 229; Thompson v. Bird, 57 N. J. Eq. 175; Sweetzer v. Jones, 35 Vt. 317; Monarch C. & M. Co. v. Hand, 197 Ill. 288; 3 Pom. Eq. Jur. §§ 1205, 1225; Jones, Mort. § 1622.

² Groves v. Sentell, 153 U. S. 465; Bernhardt v. Lymburner, 85 N. Y. 172.

³ Stevens v. Cooper, 1 Johns. Ch. (N. Y.) 425; Parkman v. Welch, 19 Pick. (Mass.) 231; Taylor v. Short's Adm'r, 27 Iowa, 361; Thomas, Mort. § 386.

⁴ *Ibid.*; George v. Wood, 9 Allen (Mass.) 80; Howard v. Halsey, 8 N. Y. 271; Thomas, Mort. § 277.

themselves, and among mortgages and other important forms of liens, may be briefly summarized.

§ 507. **Priority among Equitable Mortgages.** — Ordinarily, equitable mortgages are not in such shape or condition that they can be recorded. When, therefore, the different holders of two or more of them are contending for priority of payment, their rights are to be determined purely upon equitable principles. And the maxim, "Among equal equities priority of time will prevail," usually decides the contest. That is, the equitable mortgage which is first in time is first in right, over other equitable mortgages or purely equitable liens.¹ But, in these cases, the equality of the equities may be readily destroyed so as to give the second claim priority; as, for example, when the second is taken for value and without notice of the first, and the first was taken without paying value. And, "should they," the equities, "for any reason, be unequal — should the balance be disturbed by fraud, laches, or negligence, the otherwise prior equity may be postponed."²

§ 508. **Priority among Legal Mortgages when neither is recorded.** — Substantially the same principles as those invoked in the preceding paragraph apply among purely legal mortgages when the rights are unaffected by the record of any of them. When both are taken for value, first in time is first in right; and this is true whether or not the subsequent mortgages are taken with notice of the existence of those ahead of them in time. But one who pays value without notice takes precedence of a prior taker without value.³ And, as will be explained hereafter, the record acts materially affect these questions of priority among legal mortgages.⁴

§ 509. **Priority among Legal and Equitable Mortgages.** — Still leaving all effects of record out of account, and assuming that the holder of a legal mortgage is contending with the holder of an equitable one for priority of payment, the former uniformly prevails unless he has taken his lien after the equitable mortgage was taken, and either without value (or in some states, such as New York, without value paid at the time) or with

¹ *Phillips v. Phillips*, 4 DeG. F. & J. 218; *Spring v. Short*, 90 N. Y. 538; *Snell*, Prin. Eq. p. 23 *et seq.*

² *Bispham's Prin. Eq.* § 45; *Jones*, Mort. §§ 604–606; *In re Lake* (1903), 1 K. B. 151.

³ *Ibid.*; *Ten Eyck v. Witbeck*, 135 N. Y. 40; *McCracken v. Flanagan*, 141 N. Y. 174; *Cathcart v. Robinson*, 5 Pet. (30 U. S.) 264; *Bispham's Prin. Eq.* § 261.

⁴ § 512, *infra*.

notice of the prior mortgage.¹ The holder of the legal claim, taking it with knowledge or notice of the prior mortgage, must be bound by such notice, and stands second in order of payment. But whenever the legal mortgage is taken first, or, being taken secondly, is acquired and paid for without notice of the equitable rights, it has priority in payment.² Its precedence in claim then grows out of the application of the equitable maxim, "Where the equities are equal, the law (or the legal claim) will prevail."³

§ 510. **Priority among Mortgages and Judgments.**—A judgment against a mortgagor, when made with direct reference to the mortgaged property, — such, for example, as one determining the title to such property or fixing the rights of the claimants thereof, — in and by its own provisions ordinarily settles all questions as to priorities in the claims of the parties to the action in which it is obtained. But important controversies as to priority in right frequently arise among mortgagees and judgment creditors of the mortgagors, when the judgments are merely for sums of money, and are caused to be liens on the land of the judgment debtors solely by virtue of statutes authorizing their docketing or other public filing or registry. Thus, in most of the United States, if A obtain a judgment against B, and have it docketed as authorized by the statute, it becomes thereby a lien on B's land then owned, or which he may subsequently acquire within the time (varying from ten to twenty years) prescribed in the statute.⁴ The question then frequently arising is, shall this judgment or a mortgage on the land have priority? Of course, a recorded mortgage first in time has priority. The settled principle, also, in most of the states of this country is that an unrecorded mortgage, whether legal or equitable, has priority over a judgment subsequently obtained against the mortgagor, whether such judgment is docketed or not.⁵ The principle on which these decisions rest

¹ *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 35; *Jones v. Van Doren*, 130 U. S. 684, 691; *Drake v. Paige*, 127 N. Y. 562; *Anderson v. Blood*, 152 N. Y. 285; *Martin v. Bower*, 51 N. J. Eq. 452; *First Nat. Bk v. Connecticut M. Life Ins. Co.*, 129 Ind. 241; *Stephens v. Weldon*, 151 Pa. St. 520; *Warnock v. Harlow*, 96 Cal. 298; *Fahn v. Bleckley*, 55 Ga. 81; 2 Pom. Eq. Jur. § 767.

² *Ibid.*

³ *Bispham's Prin. Eq.* § 40.

⁴ N. Y. Code Civ. Pro. § 1251; *Roll v. Rea*, 57 N. J. L. 647; *Black, Judgments*, §§ 417, 418.

⁵ *Jackson v. Dubois*, 4 Johns. (N. Y.) 216; *Schroeder v. Gurney*, 73 N. Y. 430; *Obermeyer v. Liebman*, 51 N. Y. App. Div. 247; *Rogers v. Abbott*, 128 Mass. 102; *Pierce v. Spear*, 94 Ind. 127; *Moorman v. Gibbs*, 75 Iowa, 537; *Sappington v. Oeschli*, 49 Mo. 244; *Fin-*

is that the mortgagee, having advanced value and acquired his lien with special reference to the real property affected thereby, is, to that extent, a purchaser of the property; whereas the judgment creditor of the mortgagor did not loan the money or advance the credit, which resulted in his judgment, with special reference to the land, but, after obtaining the judgment, he simply proceeded by the statutory authority to make it a lien on the realty. The purchaser, — the mortgagee, — therefore, it is argued, should have the preference, although the judgment creditor acquired his lien without any notice of such purchasing mortgagee's right or claim.¹ This conclusion is denied in a few of the states.² And in all jurisdictions it is held, of course, that a judgment duly docketed and made a lien on real property is superior, in right to a mortgage, subsequently acquired.

§ 511. **Priority among Mortgages and other Liens.** — Mechanics' liens, liens of servants or workmen, unsafe building liens, liens by boards of health, etc., are instances of statutory claims against real property, between which claims and mortgages contests for priority frequently arise. Without going into detail with regard to these, it is simply to be said generally that the statutes which authorize filing of such liens, ordinarily, by their express terms make clear the order in which they may be asserted in connection with other rights in the property. Thus, for example, in New York, a mechanic's lien, properly filed, not only takes priority over all subsequent mortgages on the land, but also over all advances thereafter made on mortgages existing, and even recorded, at the time when it is filed.³

§ 512. **Record of Mortgages. — Its Effects on Priority.** — In most parts of England, mortgages are not recorded; and the order of priority among them, when there are several on the same land, is readily determined by the principles above explained. But, in most, if not all, of the United States, statutes authorizing the recording of mortgages make their proper record

layson v. Crooks, 47 Minn. 74; Wilcoxson v. Miller, 49 Cal. 193, 194. So of assignments for the benefit of creditors, and attachment liens. Thomas, Mort. § 290.

¹ Ibid.

² Hunt v. Swayze, 55 N. J. L. 33; Stephens v. Waldron, 151 Pa. St. 520;

Board of Comm'rs of Town of Tarboro v. Micks, 118 N. C. 162; Grace v. Wade, 45 Tex. 522; McCoy v. Rhodes, 11 How. (52 U. S.) 131; 2 Pom. Eq. Jur. 723.

³ N. Y. Lien Law (L. 1897, ch. 418), § 13.

constructive notice to all subsequent purchasers and encumbrances of the property.¹(a) Therefore, the order in which adverse claimants under different mortgages are entitled to payment is ordinarily determined by the order of the record of their instruments, and, unless actual or presumptive notice is brought home to him whose mortgage is subordinate in time, he acquires the prior lien by getting it first on record. Thus, if the same landowner make a mortgage of it to A, and thereafter another mortgage on the same lot to B, who has no knowledge or notice of any kind of A's claim, and B record his mortgage first, B has the first claim as mortgagee upon the land.²

The fact is to be emphasized that these recording acts are intended to operate, and usually do so, only for the benefit of purchasers and encumbrancers who are innocent as well as diligent. He who loans money or purchases land with actual or presumptive notice of the existence of a prior lien or encumbrance thereon, or in many states, such as New York, takes a mortgage for a past debt, can claim no benefit from his success in getting his instrument first on record.³ Presumptive notice, as was fully explained in connection with the law of trusts, is such as arises from knowledge of facts or circum-

(a) In New York, the statute defines a conveyance as including a mortgage (Real Prop. L. § 240), and then declares that: "A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded." Real Prop. L. § 241, originally 1 R. S. 756, § 1. The methods of acknowledging or proving and recording and indexing the mortgage are set forth in §§ 248-265 of the same law. Separate books are required for conveyances and mortgages. And record of a mortgage in the wrong book — the book for conveyances — does not make constructive notice. *Howells v. Hettrick*, 13 App. Div. 366.

¹ N. Y. L. 1896, ch. 547, §§ 240, 241; *Jones*, Mort. § 456; 1 *Stim. Amer. Stat. L.* § 1858. A mortgage of a leasehold is ordinarily required to be recorded with real estate mortgages. *Lambeek & B. E. B. Co. v. Kelly*, 63 N. J. Eq. 401; *State Trust Co. v. Casino Co.*, 19 N. Y. App. Div. 344.

² *Ibid.*; *Jackson v. Post*, 15 Wend. (N. Y.) 588; *Purdy v. Huntington*, 42 N. Y. 344; *Boies v. Benham*, 127 N. Y. 620; *Johnson v. Valido Marble Co.*, 64 Vt. 337.

³ Last two preceding notes; *Wilcox v. Drought*, 71 N. Y. App. Div. 402; *Thomas*, Mort. §§ 482-495.

stances actually existing, which knowledge is sufficient to put him who has it, as a reasonable person, on inquiry; and the inquiry, if properly prosecuted, would reveal clearly titles or right in question.¹

Difficult questions have sometimes been presented to the courts as to the effect of the record of an assignment of a mortgage. There is no doubt or controversy over the proposition that such record gives to the assignee for value and without notice priority over all other assignees of the same mortgage, whose assignments are not recorded until after his.² But it is held in New York, and probably in a majority of the states of this country, that an assignee in good faith and for a valuable consideration of a duly recorded mortgage obtains, by virtue of his *purchase* alone, no preference over a prior unrecorded deed or mortgage, of which he has no notice, if his vendor had notice of such unrecorded deed or mortgage. This results from the fact that, so far as the effect of the assignment of the mortgage alone is concerned, the assignee stands in the shoes of his assignor; and, if the mortgage in the hands of the latter could not prevail over the other claim or title, no more can it do so when in the hands of the former.³ It is further held, however, that the assignment of a mortgage is a "conveyance" within the meaning of the recording acts, which provide that the record of a "conveyance" shall give priority to one who holds it for value and without notice. Therefore, while the purchase alone of a mortgage does not give the purchaser any priority, his *record* of his assignment before the record of the deed or mortgage over which he is seeking to prevail, will give him priority in right over such deed or mortgage. Thus, if A hold an unrecorded mortgage on a lot of land, and B acquire a subsequent mortgage on the same lot, with notice of A's claim, and B record his mortgage, and then assign it to C, who has no notice of A's rights, then, before C records his assignment, A's mortgage has the priority; but, if now C record his assignment before A records his mortgage, A's claim becomes thereby subordinated to that of C.⁴

§ 513. Tacking — Consolidation — Future Advances — Gen-

¹ As to kinds and effects of notice, see § 407, *supra*.

² Thomas, Mort. § 497; Jones, Mort. §§ 472-474.

³ Deeker v. Boies, 83 N. Y. 215, 219; Frear v. Sweet, 118 N. Y. 454; Collier

v. Miller, 137 N. Y. 332; Jones, Mort. § 475.

⁴ Deeker v. Boies, 83 N. Y. 215; Clark v. Mackin, 95 N. Y. 346; Thomas, Mort. § 500.

eral Nature of these Principles. — In England and to some extent in this country, some peculiar results in the way of combining mortgages, or mortgage debts or payments upon them, have grown out of the combination of legal and equitable principles affecting these transactions. To some extent they are regulated by the record acts, and in other respects they are independent of those acts. The three important classes of such principles are known as tacking mortgages, consolidating them, and working out mortgages to cover future advances. A few words of explanation are needed as to each of these.

§ 514. **Tacking of Mortgages.** — Under the English theory of a mortgage, by which the legal title to the land is vested in the first mortgagee; second, third, and other subordinate mortgagees can acquire only equitable interests or liens.¹ All of these claims being generally in that country unrecorded, it occasionally happens that three or more mortgages on the same lot of land are held by mortgagees, the subsequent ones of whom have no knowledge or notice of the rights of the prior ones. The doctrine of tacking may apply under any such circumstances, whenever a mortgagee, whose claim is inferior in time but was acquired without notice of any intervening mortgage, purchases the first mortgage; or when the first mortgagee buys up one of such inferior mortgages. The two mortgages being thus obtained by the same party, and one of them being a first mortgage, which gives to him the legal title to the land, the maxim that “where the equities are equal the law” (or legal title) “shall prevail,” operates in his favor; and he can have both mortgages paid off in full before any intervening mortgagee can obtain anything upon his claim. If, for example, A hold a first mortgage, B a second one, and C a third one, and if C acquired his lien without notice of B’s, C may purchase A’s first mortgage, or A may purchase C’s third mortgage; and he who thus becomes the owner of the two has the right of payment in full of both of them before B can obtain anything upon his mortgage.² Since C, when he loaned his money and took his mortgage, did not know of the existence of B’s mortgage, his equity is equal to B’s; and, by obtaining the legal title to the land through his purchase of the first mortgage, he brings himself within the operation of the equitable

¹ § 460, *supra*.

² *Marsh v. Lee*, 1 Lead. Cas. Eq. (4th ed.) 615; *Freeman v. Laing* (1899),

2 Ch. 355; *Nichols v. Ridley* (1903), W. N. 49; *Bispham’s Prin. Eq.* § 158.

maxim above quoted. So B might first purchase A's mortgage, or A purchase B's; and these two could be then tacked so as to keep C's mortgage in its subordinate place. It will be observed that, as pre-requisites to the operation of this principle of tacking, the subordinate lien must have been acquired without notice of any intervening one which it seeks to override; and he who invokes the principle must have been, or must become, the owner of the first mortgage which embraces the legal title.¹

In a state like Massachusetts, where the same theory of a mortgage prevails as that which exists in England, the doctrine of tacking *might* operate as a principle, but for the fact that mortgages are uniformly recorded; but in practice it can very rarely occur in such states that a subordinate mortgage is acquired without constructive notice, by means of the record, of intervening claims. In the other states of this country, such, for example, as New York, or Michigan, where the lien theory of a mortgage prevails, all the mortgages on the same land, however many they may be, are only liens, and none of them confers the legal title to the land upon any mortgagee. Therefore no purchase of any number of them can give the legal title (the law) to the purchaser; the maxim, "where the equities are equal the law shall prevail," can not be invoked in favor of any such purchaser, and the doctrine of tacking, as known to the English courts, can not possibly have any application. It has been wholly repudiated, as a principle, in this country.²

§ 515. **Consolidation of Mortgages.**—Resting on the rule of *stare decisis*, rather than on any definite principle of justice, it has long been the law of England that, if one and the same creditor obtain several distinct claims against one and the same debtor, he may consolidate them into one entire demand, and insist that none of them shall be due until they are all due, and that the whole resulting amount must then be paid as one debt.³ When claims thus purchased are secured by mortgages, the same right of consolidation is there extended to the purchaser; he may treat all of the mortgages which he holds against the same mortgagor or landowner as one combined mortgage, no part of which is due until all the parts are due, and which must then be paid in full by the person against whose lands the liens exist.³ It has been more than once re-

¹ Last preceding note.

² *In re Salmon* (1903), 1 K. B. 147;

³ Thomas, Mort. § 292; Jones, Mort. Pledge v. Carr (1895), 1 Ch. 51.
§ 569; Bispham's Prin. Eq. § 159.

cently admitted by the English courts that this doctrine rests on practically nothing but ancient authority ; and it has been somewhat affected, but not wholly abolished there by statute.¹ In this country it has been generally repudiated, although followed by a few decisions.²

§ 516. **Mortgages to cover Future Advances.** — It frequently occurs, especially in connection with the loans made for the erection of buildings (commonly known as builders' loans), that mortgages are given to secure advances of money to be made in instalments from time to time. An illustration of such a transaction would be a mortgage for \$15,000, on property consisting of a lot of land on which a building is to be erected ; \$5,000 being paid down at the time of the delivery of the mortgage, \$5,000 more to be paid to the mortgagor when the house shall be half completed, and the remaining \$5,000 when it shall be wholly completed. There are rarely any difficult questions in connection with this form of mortgage, if the contract on both sides be carried out as originally contemplated by both parties. But, if the builder — the mortgagor — borrow money from other parties and give other mortgages on the land, while the building is being erected, or, if judgments or mechanics' liens or other enforceable claims be filed against the property during that time, important questions as to priority in right of payment frequently arise. And these are questions raised alike on both sides of the Atlantic from the so-called mortgages to cover future advances.

Taking the illustration above suggested, where the payments to the mortgagor are to be in three instalments of \$5,000 each, suppose after receiving the first payment of \$5,000, the builder (mortgagor) borrows \$10,000 from another party whom we will call B, and then the first mortgagee, whom we will call A, goes on and advances the second and third instalments of \$5,000 each upon the property, and the mortgagor then making default, the house and lot fail to sell for enough on foreclosure to pay off both mortgages. On the authority of the leading case in England of *Hopkinson v. Rolt*,³ it is held in that country that if A, when he made his second and third

¹ *Pledge v. White* (1896), App. Cas. 187; *Farmer v. Pitt* (1902), 1 Ch. 954.

² *Jones, Mort.* § 1083. For a few cases in which it has been approved, see *Rowan v. Sharps' Rifle Mfg. Co.*, 29

Conn. 282; *Lee v. Stone*, 5 Gill & J. (Md.) 1; *Lamson v. Sutherland*, 13 Vt. 309.

³ 9 H. L. Cas. 514.

advances, had notice of B's mortgage, B must be paid in full after A receives his \$5,000 first advanced, unless, notwithstanding his notice of B's rights, A was under a *binding obligation* to make the subsequent advances of the other two instalments and had to make them when demanded or suffer damages for his refusal to do so. That is, if A were under such binding obligation, or if he made his second and third advances of \$5,000 each without notice of B's mortgage, then A must be paid in full before B can obtain anything out of the property. Otherwise, B must be paid in full, after A has received back his first instalment of \$5,000.

Probably in a majority of the states of this country, where this vexed question has arisen, the English rule as above stated has been adopted and followed. As summarized by the New York Court of Appeals, the cases in such states "hold that the lien of the mortgage to secure voluntary future advances, will be postponed as to such advances as are made after knowledge of the existence of the subsequent mortgage in favor of the holder of the latter."¹ But the New York courts have taken more advanced ground upon this matter, and hold that, in an illustration like that above given, A shall be entitled to payment in full of his entire \$15,000, unless it did not appear upon the face of his own mortgage to cover future advances, as recorded or as known to B, that he was under a binding obligation to make them. If, by the terms of A's mortgage, as recorded or as known to B, it appear that A *must* make all the advances therein designated or be liable in damages for not so doing, he shall have priority and right to payment in full, even though, as matter of fact, by agreement *dehors* the mortgage, he is not required to make any advances after acquiring notice of intervening claims.²

Even in New York, however, if the intervening claim between the advances and the mortgage be a duly filed mechanics' lien, the statute in favor of such liens is so strong as to give it priority over all subsequent advances on the mortgage.³ But the rule of *Hyman v. Hauff*,⁴ which is that above stated as applying in New York between A and B in the illustration, operates

¹ O'Brien, J., in *Hyman v. Hauff*, 138 N. Y. 48, 54. Also *Sherras v. Craig*, 7 Cranch (11 U. S.), 34, 51; *Boswell v. Goodwin*, 31 Conn. 74; *Ward v. Cooke*, 17 N. J. Eq. 93; *Ladue v. Detroit & M. R. Co.*, 13 Mich. 380; 3

Pom. Eq. Jur. §§ 1197-1199; *Jones, Mort.* §§ 364-378.

² *Hyman v. Hauff*, 138 N. Y. 48. ✓

³ N. Y. Lien Law (L. 1897, ch. 418), § 13.

⁴ 138 N. Y. 48. -

against intervening mortgagees, judgment creditors, and all other claimants except mechanics' lienors.

Discharging and Extinguishing Mortgages.

§ 517. **Ways of Discharging.** — The wiping out of a mortgage may result from the act of the debtor, or from his taking advantage of some defence or operation of law in his favor, or from the act of the creditor in suing on the bond, or foreclosing the mortgage, or both. The remaining discussion of the law of mortgages is embraced within these two chief methods of doing away with them as securities. Under the first of these methods are to be discussed release, payment, tender, merger or extinguishment, accord and satisfaction, the Statute of Limitations, and, in a general way, the defenses which may be available against the mortgage debt.

§ 518. **Release of Mortgage.** — When a mortgage is partly paid off, the document technically known as a release comes specially into requisition. When the entire debt is paid, a satisfaction piece or total discharge is ordinarily given. Or sometimes, even in the latter case, the instrument takes the form of a release. The most common application of the release is to a blanket mortgage, that is, to one which covers several distinct pieces or parcels of land. In such a mortgage, it is commonly agreed that the mortgagee will release the different parcels on receiving part payments in the manner expressly stipulated. And ordinarily, as the distinct lots or parcels are sold by the mortgagor, he delivers to the purchasers their deeds and also releases (obtained from the mortgagee) from the mortgage in so far as their respective pieces purchased are concerned. As was explained above, after the different parcels covered by a blanket mortgage have been sold to separate purchasers, a release of any one of them by the mortgagee releases the others *pro tanto*, unless there is some positive contract to the contrary.¹

It sometimes occurs, of course, that some of the obligors of a mortgage debt are released or discharged, while the liability of the others remains. This may be done by express contract, or it may result from operation of law. An instance of the last-named method of producing it is the discharge of sureties

¹ § 505, *supra*.

on the bond, by an alteration of the bond or mortgage, or a binding extension of time for the payment of the debt, made without their consent, and without reserving the rights of the creditor against them.¹ It must be carefully noted, however, that the new contract or extension must be enforceable, or such a result will not follow. Thus, in some states, a mere contract to extend the time for the payment of a mortgage, the mortgagor advancing no new consideration, but simply agreeing to go on paying the same rate of interest, is not enforceable, since it is without consideration, and, therefore, the sureties are not discharged or released by such a contract.²

§ 519. **Payment of Mortgage.** — On or after the law day, the mortgagor, or any one having an interest in the property which would be injuriously affected by foreclosure, may validly pay the debt and discharge the mortgage. The party who so pays is entitled to evidence of the payment, which shall be available for the purpose of having the mortgage cancelled of record in case it has been, as is ordinarily true, duly recorded. In some states, this evidence is supplied by the holder of the mortgage by a simple written receipt on the document itself. But, in most of the states, it consists of a separate paper, usually called a satisfaction piece.³

While it is ordinarily the rule of law that a debtor can not demand a receipt or other evidence of satisfaction as a condition precedent to his payment of the debt, and that such a demand, accompanied by an attempted tender, vitiates the tender; yet, since the mortgage is generally on record, and, if not cancelled of record, will remain as an apparent encumbrance on the land, it is said that the party entitled to pay the debt has a right to demand a satisfaction piece, or its equivalent, from the creditor, as a condition precedent to such payment; and that, if he put the creditor to no unnecessary trouble or expense, he may make a valid legal tender of the mortgage debt, though he attach as a condition thereto the demand that he shall be supplied with such evidence of payment. Therefore, if he have a satisfaction piece prepared, and all the facil-

¹ *United States v. Freel*, 186 U. S. 309; *Robertson v. Sully*, 157 N. Y. 624; *Brown v. Mason*, 55 N. Y. App. Div. 395; *Stearns, Suretyship*, §§ 72-81.

² *Olmstead v. Latimer*, 158 N. Y. 313; *Shaffstall v. McDaniel*, 152 Pa. St. 598; *Stearns, Suretyship*, § 82.

³ *Bogert v. Bliss*, 148 N. Y. 194; *Flye v. Berry*, 181 Mass. 442; *Allen v. Leominster Sav. Bk.*, 134 Mass. 580; *Shields v. Lozeau*, 34 N. J. L. 496; *Hoyt v. Swift*, 13 Vt. 129.

ities for its due execution present, he can tender payment in full on condition that the mortgagee execute and deliver the satisfaction piece; and, if the latter refuse to do this, the tender is nevertheless valid and effectual.¹

If the payment be made without receiving a satisfaction piece or other sufficient writing or certificate, and the mortgage remain outstanding on the records, the remedy available to the landowner, in order to obtain again a clear title of record, is an action against the mortgagee to have the mortgage cancelled of record as a cloud on the title to the land.²

The satisfaction is uniformly required to be noted on the record of the mortgage, and in several states, statutes impose a penalty on the owner of the mortgage, for his failure after its payment to take the proper steps to have it cancelled of record.³ (a)

(a) The New York statute requires that: "A mortgage registered or recorded must be discharged upon the record thereof, by the recording officer, when there is presented to him the certificate signed by the mortgagee, his personal representative or assignee, and acknowledged or proved and certified in like manner as to entitle a conveyance to be recorded, specifying that the mortgage has been paid, or otherwise satisfied and discharged. The certificate of discharge, and the certificate of its acknowledgment or proof must be recorded and filed; and a reference must be made to the book and page containing such record in the minute of the discharge of such mortgage, made by the officer upon the record thereof. . . . In counties wholly embraced in a city of the first class (having a population of 250,000, or more, Const. Art. 12, § 2), no mortgage shall be discharged of record, unless in addition to the certificate provided and required by the preceding section, there shall be presented to the recording officer for cancellation the original mortgage, or a certified copy of an order made and entered as hereinafter provided. The said officer shall, at the time of the discharge of said mortgage, cancel said original mortgage by effacing the signatures thereto, without obliterating the same, and shall file the same in his office and keep the same so filed for the term of ten years." Real Prop. L. § 270, as amended, and § 270 a, as added by L. 1903, ch. 490. And § 270 a adds full provisions, in case the mortgage is lost or destroyed, or for any other reason can not be produced, for obtaining from the court "an order dispensing with the production of the said mortgage and directing the discharge thereof," and having such order filed instead of the mortgage itself.

¹ Halpin v. Phoenix Ins. Co., 118 N. Y. 165, 175. See Crawford v. Simon, 159 Pa. St. 585; Judy v. Thompson, 156 Ind. 533; Beal v. Stevens, 72 Cal. 451; Jones, Mort. § 989 *et seq.*

² Beach v. Cooke, 28 N. Y. 508; Tuthill v. Morris, 81 N. Y. 94; Kingman v. Sinclair, 80 Mich. 427; Thomas, Mort. §§ 424, 425.

³ Jones, Mort. §§ 992-1037.

§ 520. **Fund for Payment of Mortgage Debt.** — Among different parties who are interested in the mortgaged land, important questions frequently arise as to who should discharge the mortgage, or from what fund it should be paid. The most common instances which present such questions are: (a) those in which the mortgagor or other primary obligor has died, and the owners of his realty and those of his personalty are contending against each other for exemption; and (b) those in which the mortgaged land has passed hands after the making of the mortgage, and the persons who are or have been owners of it subject to the mortgage are contending for exemption. Each of these presents a different set of questions.

§ 521. (a) **Payment when Primary Obligor has died.** — When a landowner borrows money, the repayment of which he secures by a mortgage on the land, the common-law theory is that, since this transaction has increased the bulk of his personal property at the expense of his realty, if he die without satisfying the mortgage, his executors or administrators should discharge the debt out of his personal property, if they have enough for that purpose. Therefore, in the absence of contrary testamentary directions, the heir or devisee of the borrower can call upon them to exhaust the personal assets in discharging the decedent's debts, of which the mortgage is one; and he is only liable for the residue of the amount of the mortgage if such assets be insufficient to pay all the decedent's debts in full in the ordinary course and method of administration.¹ This right of the heir or devisee to call on the personal representatives for exoneration is restricted, however, to the cases in which the ancestor was himself the borrower or had in some way increased the bulk of his personal property through the making of the mortgage. Therefore, if A were to purchase land subject to a mortgage already existing thereon, so that his personal fund was never increased by the making of the mortgage, and should die intestate, letting the mortgaged land descend to B, B could not require A's personal representatives to satisfy any of the mortgage debt.²

The common-law rule, requiring the personalty of the

¹ *Ancaster (Duke of) v. Mayer*, 1 Lead. Cas. Eq. 646, 881, note; *Cumberland (Duke of) v. Codrington*, 3 Johns. Ch (N. Y.) 229; *Mollan v. Griffith*, 3 Paige (N. Y.), 402; *Brown v. Baron*, 162 Mass. 56; *Campbell v. Campbell*,

30 N. J. Eq. 415; *Gould v. Winthrop*, 5 R. I. 319; *Jones, Mort.* § 751.

² *Scott v. Beecher*, 5 Madd. 96; *Creesy v. Willis*, 159 Mass. 249; *Thomas, Mort.* § 266.

deceased borrower to exonerate the heir or devisee who takes the mortgaged land, has been changed by statute in England, New York, and several others of the American states.¹ And the general effect of such legislation is to make the land, in all cases not otherwise provided for by the decedent, the primary fund for the payment of the mortgage debt.² (a)

§ 522. (b) **Payment when Mortgagor has aliened the Land.** — A purchaser of mortgaged real property may expressly take it merely *subject* to the mortgage, without attempting to make himself in any way personally liable for the debt; or, as part consideration for the realty, he may also *assume* the debt — obligate himself personally to discharge the mortgage. The first of these results is accomplished by expressly conveying the land “subject” to the mortgage, or by equivalent words, or by not mentioning the mortgage. And the latter object is accomplished by the statement in the deed that the purchaser “assumes,” or “agrees to pay,” or “assumes and agrees to pay” the mortgage debt, or equivalent expressions.

When the purchaser of the land simply takes it “subject” to the mortgage, he can not be held, of course, personally on the bond or note or other promise which the borrower gave for the repayment of the loan.³ The purchaser, under such conditions, may lose the land by foreclosure of the mortgage; but his other property is never endangered by such a transaction, because so far as he is concerned he has only taken the mortgaged land subject to the claims of the mortgagee.

(a) The New York statute declares that: “Where real property, subject to a mortgage executed by any ancestor or testator, descends to an heir, or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator that such mortgage be otherwise paid.” Real Prop. L. § 215, originally 1 R. S. 749, § 4. And the oft-repeated judicial utterance, based on this statute, is that now, in all cases in which a testator has not provided otherwise, “the land is the primary fund for the payment of the mortgage debt.” *Hauselt v. Patterson*, 124 N. Y. 349; *Van Vechten v. Kealor*, 63 N. Y. 52, 56; *Glacius v. Fogel*, 88 N. Y. 434; *Olmstead v. Latimer*, 158 N. Y. 313, 317. See *Conkling v. Weatherwax*, 173 N. Y. 43.

¹ Stat. 17 & 18 Vict. ch. 113; N. Y. L. 1896, ch. 547, § 215; 2 Woerner, Adm. § 497.

² *Ibid.*

³ *Shepherd v. May*, 115 U. S. 505;

Bennett v. Bates, 94 N. Y. 354; *Purdy v. Coar*, 109 N. Y. 448; *Fiske v. Tolman*, 124 Mass. 254; *Dean v. Walker*, 107 Ill. 540; *Nelson v. Rogers*, 47 Minn. 103; *Foster v. Bowles*, 138 Cal. 346.

When, on the other hand, the purchaser of the land assumes the mortgage, he thereby becomes the primary obligor for the mortgage debt; and his vendor, who before the sale was primarily liable, becomes his surety. And it is on the basis of the relationship thus established, and by virtue of the principle that a creditor is entitled to be *subrogated* to all the securities for the debt which are held by a surety of the principal, that most courts rest their conclusion that the mortgagee is entitled to the benefit of the assumption agreement, even though, as is usually the case, he was not a party to it, and can recover against the assuming purchaser personally for the debt, — A being mortgagee and B mortgagor, and B selling the land to C who assumes the mortgage, A can recover in assumpsit against C on the bond, note, or other personal obligation secured by the mortgage. There is no privity between A and C, because A had nothing to do with C's assuming contract with B. But C is liable personally, because "assets have come to the promisor's" (C's) "hands or under his control which in equity belong to a third person," A.¹

Since each assuming purchaser of the land becomes the primary obligor for the mortgage debt, it follows that, in case of a series of assumptions of the mortgage debt, the last party assuming is primary debtor, and the one from whom he purchased the land is his surety, the party from whom his vendor purchased is surety for both of them, and so on backwards in the inverse order of the alienation of the mortgaged property. Thus, if A be mortgagee and B mortgagor, and B sell to C who assumes the mortgage, and then C sell to D who also assumes, D is the primary obligor, C is surety for D, and B is surety for both D and C. They are not in any sense co-sureties, but each is surety inversely for all the subsequent vendees.² And, therefore, if the present holder of the land —

¹ *Johns v. Wilson*, 180 U. S. 443, 447; *Franklin Sav. Bk. v. Cochrane*, 182 Mass. 586; *Wager v. Link*, 134 N. Y. 122, 150 N. Y. 549, 553; *Fisher v. Reach*, 202 Pa. St. 74; *Green v. Stoe*, 54 N. J. Eq. 387; *Jones, Mort.* § 755. The New York courts have vacillated some, as to the principle on which the assuming purchaser is held, placing it in some decisions simply on the doctrine of *Lawrence v. Fox*, 20 N. Y. 268. See *Garnsey v. Rogers*, 47 N. Y. 233; *Thomas, Mort.* §§ 579-590. But they

have uniformly held him liable, when the promisee (vendor) was himself personally obligated to pay the debt. The purchaser, in order to be thus bound, must expressly promise to pay the debt (and this may be oral), or take the deed containing the promise with knowledge of its existence, or under such circumstance that his knowledge and acquiescence may be presumed. *Blass v. Terry*, 156 N. Y. 122; *Wager v. Link*, 150 N. Y. 549; *Jones, Mort.* § 761.

² *Ibid.*; *Calvo v. Davies*, 73 N. Y.

the primary obligor — and the mortgagee, who has notice of the relationships, materially alter the bond or mortgage, or validly extend the time of payment without the consent of the former owners of the land, the sureties, the latter are thereby discharged.¹

There can be no binding assumption of a mortgage by a promise to a vendor who is not personally obligated for the debt. If, therefore, any one purchase mortgaged property without assuming the mortgage, his vendee's promise to him that such vendee will pay the mortgage debt, i. e., his vendee's attempted assumption of the debt, is ineffectual. Thus, if A be mortgagee, B mortgagor, and C purchase from B and assume the debt, A can recover against C a judgment on the bond or other personal obligation. If, now, C sell the land to D, who does not assume, and then D sell it E, who agrees with D that he will assume, i. e., who assumes to assume, A can not hold E personally on the debt, because D, to whom E made the promise, was not himself personally liable.²

It is to be added that, in New York, and possibly some other states, a purchase of mortgaged real property without an assumption of the debt, i. e., simply subject to the mortgage, is treated as putting the vendor substantially in the position of a surety for the land. That is, while the purchaser does not become in any way obligated on the bond or other personal security, he nevertheless holds the land as a kind of primary fund for the payment of the mortgage debt, and in such position that the vendor is thereby made, as it were, surety for the land. The result is that, if, when the mortgage debt becomes due, the purchaser and the mortgagee enter into an enforceable agreement extending the time for its payment, without the consent of the mortgagor, thereby precluding foreclosure during that time, the mortgagor is discharged from the mortgage debt to the extent of the value of the land.³

§ 523. **Tender of Mortgage Debt.** — On and after the law

211; Boardman v. Larrabee, 51 Conn. 39; Thomas, Mort. §§ 591, 592; Stearns, Suretyship, § 268.

¹ Union Mut. L. Ins. Co. v. Hanford, 143 U. S. 187; Franklin Sav. Bk. v. Cockrane, 182 Mass. 586; Paine v. Jones, 76 N. Y. 274; Stearns, Suretyship, § 81.

² Carter v. Holahan, 92 N. Y. 498; Williams v. Van Geison, 76 N. Y. App. Div. 592; Norwood v. De Hart, 30 N. J. Eq. 412; Birke v. Abbott, 103 Ind. 1.

³ Murray v. Marshall, 94 N. Y. 611; Antidel v. Williamson, 165 N. Y. 372; Baker v. Potts, 73 N. Y. App. Div. 29.

day, and down to the time when foreclosure, if any, is complete, a valid legal tender of the mortgage debt by one entitled to make payment may materially alter the rights of the parties, although the money offered is not accepted. In so far as the debt is concerned, it is generally held that the tender has no effect unless it is kept good, that is, unless the money is deposited in court subject to be drawn out by the mortgagee, or paid into a bank subject to his draft or order, or otherwise so disposed of that, without more, he may take it at any time. But, if the tender be thus kept good, it stops the running of all interest and costs on the mortgage debt.¹ Being so kept good, moreover, the tender may be successfully used as a ground for application to a court of equity to have the mortgage cancelled and discharged of record and declared to be no longer a subsisting lien upon or interest or claim in the land.²

In those states, such as New York, in which the mortgage is a mere lien on land, a valid legal tender after the law day and before foreclosure is complete, though not kept good, discharges the mortgage *as such a lien*.³ Not being kept good, however, it gives no right to the obligor in equity to enforce a discharge of the mortgage from record, either by direct affirmative proceeding for that purpose, or by an application therefor in a foreclosure suit, or other proceeding against him by the mortgagee. Thus, if A be the mortgagee, and B the mortgagor, and after the debt becomes due, B make a valid tender thereof to A, this discharges the mortgage as a lien on the land, and, whether kept good or not, is an available and effectual defence in every attempt by A to foreclose the mortgage or otherwise to enforce the lien; but, if not kept good, the tender affords to B no ground for affirmative relief of any kind, either in law or in equity — he can not succeed in a direct attempt, with himself as plaintiff, to have the mortgage cancelled of record, nor in an indirect attempt, as through his answer in a foreclosure suit, to accomplish that purpose.⁴

§ 524. **Extinguishment, or Merger.** — By the fact that the

¹ Nelson v. Loder, 132 N. Y. 288.
See Knollenberg v. Nixon, 171 Mo. 445.

² Ibid.; Shields v. Lozeau, 34 N. J. L. 496; Parker v. Beasley, 116 N. C. 1; Himmelmann v. Fitzpatrick, 50 Cal. 650.

³ Kortright v. Cady, 21 N. Y. 343; Scheick v. Donohue, 77 N. Y. App. Div. 321; Sager v. Tupper, 35 Mich. 134;

McClellan v. Coffin, 93 Ind. 456; McClung v. Missouri Trust Co., 137 Mo. 106; Thomas, Mort. §§ 396-398.

⁴ Tuthill v. Morris, 81 N. Y. 94; Werner v. Tuch, 127 N. Y. 217; Nelson v. Loder, 132 N. Y. 288; Cowles v. Marble, 37 Mich. 158; Thomas, Mort. § 399.

mortgage and the land both come into the same hands, at the same time and in the same right, a mortgage may frequently be extinguished. This is very commonly spoken of as a merger of the mortgage; but, in technical parlance, merger applies properly to the disappearance of an *estate* by its coming into the same ownership as a greater estate, while extinguishment applies to doing away with a lien or encumbrance by its coming into the hands or possession of the owner of the land.¹ It sometimes occurs that a mortgage is only partially extinguished, as, for example, when the owner of the mortgage buys up a distinct and separate portion of the mortgaged premises.²

Extinguishment of liens and encumbrances, like merger of estates, is a matter of the intention, either expressed or presumed, on the part of the owner of the property. One may purchase and hold a mortgage on his own land; and, by making his intention clear, as by writing it upon the assignment of the mortgage to himself or on some other paper, or by an oral statement in the presence of witnesses, he may prevent the lien from being extinguished, and retain the mortgage as a distinct encumbrance against his own property.³ It is sometimes expedient for one who purchases a mortgage against his own land to keep it alive in this manner, in order to use it as a muniment of title, and, if necessary, as a defence against inferior outstanding claims or encumbrances. Thus, if one purchase an old mortgage on his property, as, for instance, one that has been a lien thereon for twenty-five years, and thus retain it as a muniment of title, if within those twenty-five years inferior claims or defects have arisen against the title, he may use the mortgage so held (by assigning it to one to foreclose for him) as a means of foreclosing and barring such inferior liens or claims.

When one who has only a temporary interest in the real property pays off a mortgage without expressly indicating whether or not he means it to be extinguished, the presumption is in his favor, if this be needed to work out justice, to the effect that he did not mean to have the mortgage extinguished, but intended to retain it as a continuing lien on his

¹ Bouvier's Law Dict., "Merger."

² Smith v. Roberts, 91 N. Y. 470; Martin v. Turnbaugh, 153 Mo. 172. See Thebaud v. Hollister, 37 N. J. Eq. 402; Chase v. Van Meter, 140 Ind. 321.

³ Thorne v. Cann (1895), App. Cas. 11; Smith v. Roberts, 91 N. Y. 470; Carrow v. Headley, 155 Pa. St. 96; Goodwin v. Keney, 47 Conn. 486.

own interest and the other interests in the land.¹ When, on the other hand, an owner in fee pays a mortgage debt without indicating any intent with regard to its further existence, the presumption is ordinarily against him and in favor of treating the mortgage lien as extinguished. In order to rebut this presumption, he must express with clearness what is his actual intention with respect to the mortgage.² These presumptions, however, are stronger in law than in equity; and, in the latter court, very slight circumstances will change them.

The ordinary consequences of the coming together of the mortgage and the mortgaged lands, in the same hands, at the same time and in the same right, may be further and more fully appreciated from the following brief summary of the way in which the matter is dealt with in law, and the succeeding summary of the manner in which it is dealt with in equity.

§ 525. **Extinguishment or Merger at Law.** — When the permanent owner of land pays in full a mortgage debt thereon, and fails to express his intent, the presumption at law is practically conclusive that the mortgage is extinguished. But, when he clearly expresses an intention to the contrary, the courts of law treat the mortgage as still existing against his property. These are the only two alternatives which exist simply in a court of law.³ In examining title to real property, however, it is not safe to rely on mere presumption of the extinguishment of a mortgage or other encumbrance, from the fact that it and the legal title appear to have been in the same person at the same time. This is because, before the time when the mortgage and fee appear by the records to have come into the same hands, the owner of the mortgage may have assigned it to one who did not record the assignment. The record of such assignment is not necessary as a protection to the assignee against a subsequent purchaser of the property mortgaged, or against any person other than a subsequent purchaser in good faith of the mortgage itself, or of the bond or debt secured by such mortgage.⁴

¹ *Harvey v. Hobray* (1896), 1 Ch. 137; *Cherwood v. Allen* (1899), 1 Ch. 353; *Jones, Mort.* § 864.

² *Ibid.*; *In re Pride* (1891), 2 Ch. 135; *Betts v. Betts*, 9 N. Y. App. Div. 210.

³ *Forbes v. Moffatt*, 18 Ves. 389; *Hull v. Cronk*, 55 N. Y. App. Div. 83,

84; *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Buzzell v. Still*, 63 Vt. 490; *Lyman v. Gedney*, 114 Ill. 388.

⁴ *Curtis v. Moore*, 152 N. Y. 159; *Purdy v. Huntington*, 42 N. Y. 334; *Carrow v. Headley*, 155 Pa. St. 96; *Thomas, Mort.* § 370.

§ 526. **Extinguishment or Merger in Equity.** — When the same kind of a question is presented to a court of equity, the two propositions of the last preceding section express the outcome, if there be no counteracting circumstances or equitable conditions. That is, such circumstances or conditions being absent, equity treats payment by the permanent owner as an extinguishment, unless he clearly indicates an intention to the contrary. But the courts of equity go one step further than those of law, in this matter, and *presume* that no extinguishment was intended, if the opposite presumption would work a hardship on him who pays the mortgage debt.¹ If, for example, a purchaser of mortgaged real property, who obtained his title from a married man, the wife not joining in the deed of conveyance though she had joined in the mortgage, should be falsely informed that such wife had died, and, believing this to be true, should pay off the mortgage without having it satisfied of record, or otherwise indicating what he intended with regard to it, equity would allow him to treat it as a continuing lien on his land for the purpose of warding off the claim of dower made by the wife of his vendor. By so keeping it alive, since the claimant of dower had joined in it, and to that extent had released her dower right, he could prevent her from obtaining any dower interest in the land, except in the surplus value thereof remaining after the payment of the mortgage debt; whereas, if the mortgage should be treated as extinguished, her dower could be claimed against all of the property.² So, if in any other manner it would result in hardship to the purchaser of the mortgage on his own property to treat the mortgage as extinguished, as, for example, by thereby letting a subordinate mortgage or judgment or other lien become a first claim on the property, equity, on his showing that in paying off the mortgage he was ignorant of the fact that such advancement of the other claim would be the result, will allow him to hold the mortgage alive as a continuing security against his own property.³

¹ *Turner v. Smith* (1901), 1 Ch. 213; *Snow v. Boycott* (1892), 3 Ch. 110; *Factor's, etc. Ins. Co. v. Murphy*, 111 U. S. 739; *Ewell v. Hubbard*, 46 N. Y. App. Div. 383; *Steele v. Walter*, 204 Pa. St. 257; *Clark v. Glos*, 180 Ill. 556; *Patterson v. Mills*, 69 Iowa. 755; *Chase Nat. Bk. v. Security Sav. Bk.*, 28 Wash. 150; *Coleman & B. Co. v. Rice*, 115 Ga. 510.

² *Forbes v. Moffat*, 18 Ves. 384; *Eaton v. Simonds*, 14 Pick. (Mass.) 98; *Mallory v. Hitchcock*, 29 Conn. 127.

³ *Ibid*; *In re Pride* (1891), 2 Ch. 135; *Denzler v. O'Keefe*, 34 N. J. Eq. 361; *Ryer v. Gass*, 130 Mass. 227; *Duffy v. McGuinness*, 13 R. I. 595; *Wilson v. Vanstone*, 112 Mo. 315; *Lowman v. Lowman*, 118 Ill. 582; *Thomas, Mort.* §§ 364, 365.

§ 527. **New Agreement, or Accord and Satisfaction.** — By substituting other securities for the mortgage, or advancing any value of another character in its place, the mortgagor may also discharge the lien or claim. This method of doing away with it is simply mentioned for the sake of completeness. It is, in effect, the payment of the mortgage by means of some value other than money; and it may simply be remarked that the agreement by the mortgagee to accept such other value in the place of the mortgage constitutes an accord between the parties, and the actual handing of that value over to him by the mortgagor, and its acceptance by him, constitute satisfaction. Both the accord and satisfaction being proved, the discharge of the mortgage in this manner is established.¹

§ 528. **Statute of Limitations.** — As long as the mortgagor or other party obligated to pay the debt continues regularly to pay interest or instalments of the principal, the debt and the mortgage security are not affected by the Statute of Limitations. But, after the law day and a cessation of regular payments, that statute begins to run after the last instalment of principal or interest has been paid.² It is to be noted that, under the statutes in most states, the mortgage, being a sealed instrument dealing with real property, is not barred until the expiration of twenty years after such last payment. When a bond accompanies the mortgage, the period of the statute as against it is ordinarily the same; but when the debt is represented by a promissory note, or bill of exchange, or mere oral promise, or other simple contract, six years is the usual time for the running of the statute. And thus the debt, in instances like the last, may be barred by the Statute of Limitations, while the mortgage security has yet many years to run before such statute will operate against it as a bar.² This is one of the reasons why, in most jurisdictions, the debt is represented by a bond, or other specialty, rather than by a simple contract. (a)

(a) In New York, a mortgagor, or his heirs, or any person having an interest in the mortgaged land, or in any money into which the land has been converted under a decree of a court, which money is being held in place of such land, may have a judicial proceeding to have the mortgage discharged of record, when, from lapse of time, it is presumed to be paid. And the procedure, on such an application, is prescribed by L. 1862, ch. 365, as finally amended by L. 1901, ch. 287.

¹ Chase's Blackst. Com. p. 622, and note.

² § 458, *supra*; Mack v. Anderson, 165

N. Y. 529; Murdock v. Waterman, 145 N. Y. 55; Knapp v. Crane, 14 N. Y. App. Div. 120; Thomas, Mort. §§ 410-415.

One of the ordinary cases in which the Statute of Limitations begins to run in connection with a mortgage is where there has been a defective foreclosure of the mortgage, the defect arising from the fact that one or more of the necessary parties defendant have not been made parties to the action. The purchaser at such a defective foreclosure sale, of course, pays nothing thereafter on account of the mortgage; and, therefore, immediately upon his taking possession of the land, the Statute of Limitations begins to run against the right of such omitted parties to redeem the property from the mortgage. For example, if in the foreclosure suit the wife of the mortgagor, whose dower was subordinate to the mortgage, should be inadvertently omitted as a party, she would be entitled to redeem the property from the mortgage as soon as the sale on foreclosure was complete, and the purchaser had taken possession of the land. Her right having thus accrued, the Statute of Limitations would immediately begin to run against it; and, if she did not redeem within twenty years thereafter, all her dower right and interest in the land would become thereby barred. And this result would follow, even though her husband were still living during some or all of the time of the twenty-year period of the statute.¹

§ 529. **Defences against Mortgages.** — The methods above discussed for discharging and extinguishing a mortgage are those which are available against such security as has been at one time valid and enforceable. In addition to these, it is of course true, with regard to a mortgage as with regard to all claims, that its enforcement may be prevented, and the apparent lien may be nullified and shown to be void, by any of the ordinary defences which may be set up in judicial proceedings. Thus, in a foreclosure suit or other proceeding to enforce the mortgage, the defence of infancy on the part of the mortgagor, or insanity, or undue influence, or fraud, or part payment, is as available as it would be in an action at law on the bond.²

¹ *Simar v. Canaday*, 53 N. Y. 298, 303; *Campbell v. Ellwanger*, 81 Hun, 259.

arising from usury laws, see *Buckingham v. Corning*, 91 N. Y. 525; *Ganz v. Lancaster*, 169 N. Y. 357.

² For illustrations of such defences,

CHAPTER XXIX.

MORTGAGES — ENFORCING SATISFACTION OF MORTGAGE DEBT — FORECLOSURE OF MORTGAGES.

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Enforcing Satisfaction of Mortgage Debt.

§ 530. **Forms of Remedy.** — The methods of discharging a mortgage or frustrating recovery thereon, as above discussed, are those which are available to the mortgagor or other persons

obligated upon the debt. The debt becoming due and remaining unpaid, the methods by which the creditor may enforce payment or otherwise obtain redress are lastly to be discussed. These are in general by action at law upon the debt, by a foreclosure of the mortgage, or by a procedure involving in substance both of these remedies.

In the absence of statutory restriction, the mortgagee is permitted, after the law day, to sue at law on the bond or other evidence of debt and to foreclose the mortgage in equity at the same time.¹ The principle upon which this result is reposed is that, since the mortgagor has entered into the two-fold obligation, it is conforming to the agreement of the parties to permit the two-fold remedy. But, where these two proceedings are thus permitted to be carried on at the same time, the mortgagee is not allowed thereby to obtain more than one complete satisfaction of his claim. When, for example, he first recovers judgment at law, and it is satisfied in full, this action is a bar to and a complete termination of the foreclosure suit. And if, in the foreclosure suit, he first succeed in selling the land and obtain complete payment therefrom, equity will stay all further proceedings on the debt in the law court.² In England, and in a few of the American states of which Massachusetts is an illustration, this double remedy — with not more than one satisfaction as the possible outcome — is still permitted.³

In many of the United States, the two remedies are forbidden by statute to be prosecuted concurrently. One or two of these statutes, as, for example, that of New Jersey, require foreclosure of the mortgage to be first completed; and, if full satisfaction be not thus obtained, an action at law on the bond, or other evidence of debt, may be subsequently brought for the deficiency.⁴

But, in more of the states, — New York, Michigan, Indiana, and Nebraska, being examples, — the mortgagee is allowed to elect, either first to sue at law on the evidence of debt, or first to foreclose the mortgage; but he can not proceed with both of these suits at the same time, unless he obtains for that purpose

¹ *Garforth v. Bradley*, 2 Ves. Sr. 678; *Draper v. Mann*, 117 Mass. 439; *Jones, Mort.* §§ 1215, 1216, 1222.

² *Ibid.*

³ *Trustees of Smith Charities v. Connolly*, 157 Mass. 272.

⁴ *Gen. Stat. of N. J.* p. 2112, § 47; *Holmes v. Seashore Electric Ry. Co.*, 57 N. J. L. 16.

the permission of the court.¹ Such permission will not be given, in the absence of some special equity which makes it proper and fair that the mortgagee should have the two-fold concurrent redress.² But the prohibition against proceeding with both suits at once is ordinarily restricted, by the construction of the statutes, to legal mortgages. It does not usually apply, for example, to equitable mortgages held as security for bonds or notes, nor to mechanics' liens which have been filed as collateral to promises for the payment of debts.³

In states like New York, in which the holder of a legal mortgage is thus compelled to elect between the forms of remedy, unless he can get the consent of the court to prosecute both at once, the codes ordinarily supply indirect incentives for the foreclosure of the mortgage in the first instance. One of these is found in the statute which enables the mortgagee, if the land fail to sell on foreclosure for enough to pay the debt, to enter, in the foreclosure proceeding and without the necessity for a separate action at law on the debt, a money judgment for the deficiency, against the mortgagor and all others who are personally bound to pay the mortgage debt.⁴ Such judgments are styled deficiency judgments. Another of such incentives arises from the statutory provision that, if the mortgagee first sue on the bond or other evidence of debt and obtain judgment thereon, he shall not have an execution on that judgment levied against the property covered by the mortgage which is collateral security for that debt. Thus, if A hold B's bond for \$10,000, secured by B's mortgage on Whiteacre, and A sue B at law on the bond and recover judgment, his attorney, on issuing execution, must instruct the sheriff not to levy on Whiteacre by virtue of that execution.⁵ (a) The

(a) The New York Code Civ. Pro. (§§ 1432, 1433) requires that, "§ 1432: The judgment debtor's equity of redemption, in real property mortgaged, shall not be sold by virtue of an execution, issued upon a judgment recovered for the mortgage debt, or any part thereof." "§ 1433. Where an execution against property is issued upon a judgment, specified in the last section, to the county where the mortgaged property is situated, the attor-

¹ N. Y. Code Civ. Pro. §§ 1628-1630; *Reichert v. Stilwell*, 172 N. Y. 83; *Dudley v. Congregation of St. Francis*, 138 N. Y. 451; *Jones, Mort.* § 1223, note 1.

² *Matter of Moore*, 81 Hun (N. Y.), 329; *Matter of McLaughlin v. Durr*, 76 N. Y. App. Div. 75.

³ *Matter of Gould Coupling Co.*, 79

Hun (N. Y.), 206; *Smith v. Fleischman*, 23 N. Y. App. Div. 355.

⁴ N. Y. Code Civ. Pro. § 1627; *Frank v. Davis*, 135 N. Y. 275; *Dudley v. Congregation of St. Francis*, 138 N. Y. 451; *Jones, Mort.* §§ 747-750.

⁵ N. Y. Code Civ. Pro. §§ 1432, 1433; *Peck v. Ormsby*, 55 Hun (N. Y.), 265.

object of this restriction is thus apparent, — to prevent the mortgaged property from being reached for the mortgage debt by any method other than by foreclosure of the mortgage, and thus indirectly to induce the mortgagee to proceed in the first instance with a foreclosure suit.

§ 531. **Foreclosure of Mortgages — Kinds of Foreclosure.** — In the outline of the development of the mortgage from a mere sale on condition subsequent to its present form, it was stated above that the fifth and last stage in that development consisted in the improvements made on the foreclosure of mortgages.¹ In working out those improvements, many modifications of foreclosure suits have been produced. It is impossible, in a work of this size, to explain all of such modifications and variations. But the forms of foreclosure, which stand out most prominently among them all, and which present the types most necessary to be understood, may be grouped in four classes. They are: (a) Strict Foreclosure, (b) Foreclosure by Entry, Notice and Lapse of Time, (c) Foreclosure by Advertisement, and (d) Equitable Foreclosure, so called, or foreclosure by sale of the land. These will be discussed in the order named.

(a) *Strict Foreclosure.*

§ 532. **Origin and Purpose.** — After the court of equity had created the equity of redemption, as above explained, in favor of the mortgagor, and had subsequently, by analogy to the Statute of Limitations, fixed the time within which the mortgagor could redeem against the mortgagee in possession (at twenty years after the law day), it frequently became apparent that, in mitigating the mortgagor's hardships, the court had gone too far against the rights of the mortgagee. The natural and logical remedy for the hardship thus inflicted upon the lender was the invention in his favor of a method of restricting the right of redemption. He needed and was given the ability to bar, shut out, or "*foreclose*" this equitable right of the mortgagor. And,

ney, or other person who subscribes it, must indorse thereon a direction to the sheriff, not to levy upon the mortgaged property, or any part thereof. The direction must briefly describe the mortgaged property, and refer to the book and page where the mortgage is recorded. If the execution is not collected out of the other property of the judgment debtor, the sheriff must return it wholly or partly unsatisfied as the case requires."

¹ § 437, *supra*.

in affording him this remedy, the court of equity first brought into being a strict foreclosure, the decree in which requires the mortgagor to exercise his right of redemption within a specified time (usually six months) or be “forever barred and *foreclosed*” of that right.¹

§ 533. **Decree of Strict Foreclosure and its Effects.** — The proceedings in the suit having been carried through as required by the local rules or statutes, the judgment or decree of foreclosure in effect vests the absolute title to the land in the complainant, or plaintiff, unless the persons entitled to redeem do so within the specified time — usually six months. If they fail so to redeem, the plaintiff will be given a writ of assistance, if needed, or any other proper order or aid of the court, that may be requisite to his acquisition of a perfect title to and complete possession of the property. But, while this bars the defendants of all equity of redemption, it does not satisfy the debt, unless the property is of sufficient value to pay it. And whether or not it is of such value may be determined in an action on the personal obligation.²

It will be noted that this form of foreclosure is practically the converse of a suit to redeem. In the latter form of procedure, the mortgagor or his successor in interest is complainant, and the typical form of the decree provides that he *may* redeem within a designated time, and, if he fail to do so, then his right of redemption shall terminate. In the strict foreclosure, on the other hand, the mortgagee or his successor in interest is the complainant, and the typical form of the decree is that redemption *must* be made within the specified period, or the right to make it shall cease. In the strict foreclosure, the defendants may usually obtain from the court some extension of the time to redeem, as such time is first decreed. But in the suit to redeem, since the complainant (the mortgagor) is the one who is asking to have the time fixed against himself, such extension of time is much less apt to be granted.³

§ 534. **Where Strict Foreclosure is employed.** — This method of foreclosing mortgages is naturally the oldest and most severe; and is still employed in England, and in some of

¹ Clark *v.* Reyburn, 8 Wall. (75 U. S.) 318; Lansing *v.* Goelet, 9 Cow. (N. Y.) 346; Bolles *v.* Duff, 43 N. Y. 469; McCarren *v.* Coogan, 50 N. J. Eq. 268; Devereaux *v.* Fairbanks, 52 Vt. 587; 4

Kent's Com. pp. *180, *181; Wiltsie, Mort. Forecl. § 826.

² Ibid.; Green *v.* Geiger, 46 N. Y. App. Div. 210; Jones, Mort. §§ 1561-1568.

³ Thomas, Mort. §§ 714-716.

the New England states, such as Massachusetts, Connecticut, and Vermont.¹ In the great majority of the American states, it is not favored; but the equitable foreclosure, so called, which results in a sale of the land, payment of the mortgage debt out of the proceeds, and an ultimate return of any surplus to the mortgagor, is the prevalent method of enforcing the mortgage lien against the land.²

Even in those jurisdictions, however, in which the mortgage is treated as a mere lien on the land, and the equitable foreclosure is most prevalent, there are, in the absence of absolute prohibitory statutes, some circumstances under which a strict foreclosure is still permitted. Thus, where the parties in one state proceed in equity for the strict foreclosure of a mortgage on land situated in another state, and show to the court some fair and just reason why the remedy prayed for should be granted, the court, acting as it does *in personam*, may grant such remedy.³ Again, and perhaps more commonly than in the instance just mentioned, when, pursuant to the local statute, a foreclosure by sale has occurred, but an encumbrancer of the land whose claim was subordinate to the mortgage foreclosed was not made a party to the suit, and knowing that he was inadvertently omitted he failed to intervene, and thereby allowed an innocent purchaser to acquire the property for value at the foreclosure sale in the belief that he was obtaining a valid title, such innocent purchaser may have a strict foreclosure against such outstanding encumbrancer. Thus, even in the state of New York where the statute in form requires that every foreclosure proceeding "must direct the sale of the property mortgaged, or such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action,"⁴ a strict foreclosure is possible under the conditions above expressed, which may be more fully explained by the following illustration. Supposing that A is mortgagor, B first mortgagee, and C second mortgagee, and that B forecloses his mortgage, properly making all necessary persons parties defendant except C, who is inadvertently omitted, and that C, knowing these facts,

¹ Norton v. Palmer, 142 Mass. 433; Palmer's Adm'r's v. Mead, 7 Conn. 149, 152; Waters v. Hubbard, 44 Conn. 340; Paris v. Hulett, 26 Vt. 308; Devereaux v. Fairbanks, 52 Vt. 587; Williams v. Hilton, 35 Me. 547; Jones, Mort. §§ 1542-1556.

² 4 Kent's Com. p. *181; Wiltsie Mort. Forecl. §§ 828-830.

³ House v. Lockwood, 40 Hun (N. Y.), 532, discussed in Wiltsie, Mort. Forecl. § 834; Eaton v. McCall, 86 Me. 346.

⁴ N. Y. Code Civ. Pro. § 1626.

abstains from revealing his rights, and allows the land to be sold on foreclosure to D, who purchases in good faith and for value, believing that his title will be perfect. C, whose equity has not been foreclosed, may redeem the land from D at any time within twenty years after the beginning of D's possession, by paying to him the principal of such first mortgage, with interest and costs to the date of the payment. If, now, C unreasonably refuse to make such redemption, or to relinquish his right thereto, D may have a strict foreclosure of the first mortgage, and obtain therein a decree against C, that the latter shall exercise his right of redemption within (say) six months, or be forever barred and foreclosed of all interest in the land.¹

(b) *Foreclosure by Entry, Notice, and Lapse of Time.*

§ 535. **General Nature of this Remedy.** — A species of statutory strict foreclosure, as it may be fairly called, exists in some of the New England states, such as Massachusetts, Maine, New Hampshire, and Rhode Island.² The statutes in these states permit a holder of a mortgage, by following a prescribed course of procedure after the law day, to work out by lapse of time a foreclosure, without the necessity for applying to any court. The three stages or steps generally required for this procedure are entry upon the land, some form of notice to the mortgagor or his successors in interest of the purpose of the entry, and subsequent retention of the land for the prescribed period. Each of these steps is to be briefly explained.

§ 536. **Entry.** — Pursuant to the statute, the holder of the mortgage may make peaceable and open entry upon the land in the presence of witnesses, who thereupon make a certificate of the fact and file it with the county clerk. It is not necessary, though of course it generally results, that the other possessors of the land shall be ousted by such entry. It is sufficient that the entry is peaceable and open.³

¹ *Dicta* in *Moulton v. Cornish*, 138 N. Y. 133, 141, and *Denton v. Ontario Co. Nat. Bk.*, 150 N. Y. 126, 134. And see *Bolles v. Duff*, 43 N. Y. 469; *Breed v. Ruoff*, 173 N. Y. 340, 346; *McCarren v. Coogan*, 50 N. J. Eq. 268; *Illinois Starch Co. v. Ottawa Hydraulic Co.*, 125 Ill. 237.

² *Jones*, Mort. § 1238; 1 Stim. Amer. Stat. L. § 1921.

³ 1 Stim. Amer. Stat. L. § 1921; Rev. L. Mass. (1902) ch. 187, § 1; Pub. Stat. N. H. (1901) ch. 139, § 14; Gen. Laws R. I. (1896) ch. 207, § 3; *Boyd v. Shaw*, 14 Me. 58; *Thompson v. Kenyon*, 100 Mass. 108; *Thompson v. Ela*, 58 N. H. 490; *Daniels v. Mowry*, 1 R. I. 151; *Jones*, Mort. §§ 1246-1257.

In Maine, Massachusetts and New Hampshire, a writ of entry, and in Rhode Island an ejectment suit, may be maintained, when necessary or preferable, for acquiring possession. And in such a suit the amount due on the mortgage may be ascertained and declared.¹

§ 537. **Notice—By Certificate.**—In most of these states, the statute requires, when the entry has been without any judicial proceeding, that those whose interests are being barred by this procedure shall be notified of its being carried on; and prescribes the manner in which such notice shall be given. This is ordinarily by the certificate of the witnesses, duly made and filed as required by the statute.²

§ 538. **Lapse of Time.**—In all of these jurisdictions except New Hampshire, the possession under such procedure, if properly continued for three years, results in a statutory foreclosure and bar to all the interest and rights of the mortgagor and those parties whose ownerships or claims are subordinate to the mortgage.³ In New Hampshire, the time prescribed for such possession is only one year; but it is there required that at least six months before foreclosure is complete, publication of the entry and holding by the mortgagee against all parties in interest shall be duly made as prescribed by the statute.⁴

The ordinary effect of this form of foreclosure is, like strict foreclosure in equity, not only to bar the equity of redemption, but also to discharge the debt to the extent of the value of the land.⁵

(c) *Foreclosure by Advertisement.*

§ 539. **What Mortgages may be so foreclosed.**—The custom of inserting in a mortgage a clause, giving to the mortgagee a power to sell the property after the law day, is almost as old as the law of mortgages; and has come to be very prevalent in both England and the United States. A mortgage, which contains such a clause, and is held as security for a liquidated amount of money, and has been duly recorded, if default in payment be made, may be foreclosed by advertisement. Thus, there appear

¹ Jones, Mort. §§ 1276-1316; 1 Stim. Amer. Stat. L. § 1925; Ladd v. Putnam, 79 Me. 568.

² Ibid.; Furnas v. Durgin, 119 Mass. 500; Jones, Mort. §§ 1259-1263; 2 Wash. R. P. (6th ed.) p. 244, p. *605.

* Ibid.

⁴ N. H. Pub. Stat. (1901) ch. 139; Smith v. Packard, 19 N. H. 575; Thompson v. Ela, 58 N. H. 490.

⁵ Ibid.

four essentials to such a foreclosure; namely, a power of sale in the mortgage, liquidation of the amount secured, default in payment, and due and proper record of the document.¹ The existence of a proper record is essential, in order that the purchaser at the sale may have due notice of the terms of the mortgage.² And the requirement that the amount of the debt shall be liquidated is apparent as a requisite, when it is understood that this form of foreclosure requires no procedure in court, and is simply an act by the creditor alone for the recovery of an amount claimed by him to be due — that amount must be fixed so that his claim may be definite and certain.³

§ 540. **Who may thus foreclose.** — It is a general principle applicable to powers over real property that they can not be delegated. They are ordinarily personal and confidential, and carry with them certain trust obligations to the donees. There has, therefore, been much judicial controversy over the question of the passing of a power of sale in a mortgage to the assignee of the mortgage; or, in case of the death of its owner, to his executors or administrators. The weight of judicial opinion and determination has been in favor of sustaining the assignability of such powers as these, since they are manifestly given and received by the parties as part of the security for the mortgage debt. And, in most of the states of this country, it is now settled by positive legislation that a power of sale in a mortgage is a part of the security held by the mortgagee, and passes by assignment, descent, or other devolution of the mortgage itself. Therefore, it may be stated generally that any one who owns the mortgage owns and may execute the power of sale, which became a part of the mortgage security at its inception.⁴

§ 541. **Method of Foreclosing by Advertisement.** — A mortgage containing a clause which in terms authorizes the mortgagee to sell the land after default by the mortgagor could be foreclosed at common law simply by sale by the mortgagee, whether such sale were public or private, in such manner as was reasonably fair to all the interested parties. But the preparation for such sale and the manner in which it shall be conducted, in recent times, have come to be regulated by exact and, in some cases, minute statutory requirements. These

¹ Thomas, Mort. §§ 1103, 1104.

² Ibid.; Wilson v. Troup, 2 Cow. (N. Y.) 195.

³ Lewis v. Doane, 141 N. Y. 302, 309.

⁴ § 493, *supra*; Thomas, Mort. § 1105.

vary materially in the different states ; and the statute of each locality is required to be minutely studied and literally followed, in order properly to foreclose a mortgage by this so-called method of advertisement.¹

Without attempting any complete or minute statement as to this method of foreclosure, it may be said generally that the statutes require a considerable time of advertisement before the sale (as, for example, in New York, in a newspaper of the county where the land is, once a week for twelve weeks), notice filed with the county clerk and duly posted in designated conspicuous places, and personal notice served on the mortgagor or other owner of the land.² The statutes are full and complete in their provisions for adjournments of the sale and methods of giving notice of the same. They ordinarily require that the sale shall be at public auction.³ In many jurisdictions, no deed to the purchaser is needed ; but the evidence of his title is afforded by affidavits, made as required by the statute and properly filed and indexed by the clerk of the county in which the land is situated.⁴ The money received from the property is applied, first to the payment of the mortgage and interest and statutory costs and allowances, and the surplus, if any, may be reached by the mortgagor or present owner of the land, subject, however, to the rights of subordinate or intervening encumbrancers who may require their claims to be satisfied therefrom after said payment on account of the foreclosed mortgage.⁵ It is to be repeated and emphasized that these statutory procedures are to be strictly and accurately followed, or the purchasers at the sale do not obtain valid titles. There being no judgment, but the procedure being entirely *in pais*, irregularities or errors, which would be cured by the judgment in judicial foreclosure, readily become material and even fatal to the title, when they exist in foreclosure by advertisement.⁶

¹ N. Y. Code Civ. Pro. §§ 2387-2409 ; 1 Stim. Amer. Stat. L. § 1924 ; Wiltsie, Mort. Forecl. § 768.

² N. Y. Code Civ. Pro. § 2388 ; Webb v. Haeffer, 53 Md. 187 ; Bragdon v. Hatch, 77 Me. 433 ; Wiltsie, Mort. Forecl. §§ 773-792.

³ N. Y. Code Civ. Pro. § 2393 ; Wiltsie, Mort. Forecl. § 795. See Mowry v. Sanborn, 68 N. Y. 153 ; Griffin v. Marine Co., 52 Ill. 130.

⁴ N. Y. Code Civ. §§ 2400, 2396-2398 ; 1 Stim. Amer. Stat. L. 1924 (e). See Cranston v. Crane, 97 Mass. 459 ; Munn v. Burges, 70 Ill. 604 ; Tripp v. Ide, 3 R. I. 51 ; Wiltsie, Mort. Forecl. § 824.

⁵ N. Y. Code Civ. Pro. §§ 2406-2408 ; Cope v. Wheeler, 41 N. Y. 303 ; Reynolds v. Hennessy, 15 R. I. 215 ; Newhall v. Lynn Sav. Bk., 101 Mass. 428 ; Thomas, Mort. §§ 1155-1157.

⁶ See Wiltsie, Mort. Forecl. §§ 768-

(d) *Equitable Foreclosure, or Foreclosure by Sale.*

§ 542. **General Nature of such Foreclosure.** — The remedy on the mortgage, which has come to be the favorite and most common procedure in this country, results in a sale of the mortgaged property, pursuant to a judgment or decree of the court, by an officer designated by the court for that purpose, and in the payment of the mortgage debt out of the proceeds; the surplus, if any, being handed over to the mortgagor or made available, before being so handed over, for the satisfaction of subordinate liens. Thus the mortgagee is paid in full, if the land sell for a sufficient sum; and yet the mortgagor may have some of his property restored to him in the form of surplus. This method of foreclosure is logically and properly described as equitable.

§ 543. **When Right thus to foreclose exists.** — The holder of the mortgage may foreclose it in this manner for any part of the debt, whether principal or interest, that is due and remains unpaid. Thus, although the law day has not arrived, yet, if pursuant to the terms of the mortgage an instalment of interest be due, a foreclosure for this amount may be had, and as much of the land may be sold as is necessary for its payment. So, if the debt become due in instalments, a separate foreclosure may be conducted for the payment of each instalment as it becomes due.¹ When the foreclosure is for less than the entire mortgage debt, principal and interest, if the land can be sold in parcels, it will ordinarily be required by the court that so much of it only shall be sold as is needed to satisfy the amount then due.² But if it be found by the court that it is best to sell the property as a whole, this may be done; and either the entire mortgage may be paid off, with suitable rebate of interest, or the surplus at the time invested under the order of the court and held subject to the payment of future instalments as they shall become due. In the most ordinary form of mortgage, of course, all the debt becomes due at the same time; and this method of foreclosure is usually for the recovery of the whole amount of the mortgage, principal, interest, expenses, and costs.

825; Jones, Mort. §§ 1723-1763; Thomas, Mort. §§ 1099-1159.

¹ *Lansing v. Capron*, 1 Johns. Ch. (N. Y.) 617; *American Life & F. Ins. Co. v. Ryerson*, 6 N. J. Eq. 9; *Allen v. Wood*, 31 N. J. Eq. 103; *Bridgeman v.*

Johnson, 44 Mich. 491. See *Reichert v. Stilwell*, 172 N. Y. 83; *Metropolitan Bk. v. St. Louis Dispatch Co.*, 149 U. S. 436.

² N. Y. Code Civ. Pro. §§ 1634, 1636, 1637; Thomas, Mort. §§ 814, 815.

§ 544. **Ascertaining Parties to Foreclosure Suit.** — One of the most important points of inquiry connected with the foreclosure of a mortgage is concerned with the ascertainment of the necessary and proper parties to the action. Speaking generally, it may be said that all those persons are necessary parties who have interests, rights, liens, or claims in the property subordinate to the mortgage. For these are the parties whose rights and claims are to be shut out and foreclosed by the action.¹ In practice, the method of ascertaining them is by the continuation of the searches, which are ordinarily made in the process of examining title at the time of the making of the mortgage. By having these properly continued down to the date of beginning foreclosure, all the transfers of the land and all the liens or encumbrances which have been imposed thereon, after the mortgage was delivered, are fully disclosed.

§ 545. **Parties Plaintiff.** — The plaintiff in the action is commonly, of course, the mortgagee. When there are two or more mortgagees, they are ordinarily joint owners, and should unite as plaintiffs in the action. But one or more of them, less than all, may maintain the action.² When there has been one or more assignments of the mortgage, the owner thereof at the time of foreclosure is the proper party plaintiff; and it is proper and often advisable, especially when the assignment is as security for a debt, for him to join the assignor or assignors of the mortgage through whom his title to it has come.³ In the code states, it is uniformly required by statute that the party in interest shall sue; and such party is, of course, the owner or owners of the mortgage at the time the foreclosure is commenced.⁴

§ 546. **Parties Defendant.** — In the practice under most of the modern codes in this country, there is a twofold object in the equitable foreclosure of a mortgage; namely, to sell the land free and clear of all encumbrances, or at least of all encumbrances subordinate to the mortgage, and to obtain in the same action a money judgment, commonly designated a defi-

¹ §§ 545-548, *infra*.

² *Paton v. Murray*, 6 Paige (N. Y.), 474; *Sandford v. Bulkley*, 30 Conn. 344. But, when less than all the co-owners are plaintiffs, the others should be made defendants. *Thomas, Mort.* § 720; *Wiltsie, Mort. Forecl.* §§ 70, 78; *N. Y. Code Civ. Pro.* § 446, 448.

³ *Thomas, Mort.* § 718; *Wells v. Wells*, 53 Vt. 1; *Consolidated Nat. Bk. of San Diego v. Hayes*, 112 Cal. 75; *Merrell v. Bishoff*, 3 N. Y. App. Div. 361.

⁴ *N. Y. Code Civ. Pro.* § 449. See, as to parties plaintiff generally, *Wiltsie, Mort. Forecl.* §§ 72, 89-114.

ciency judgment, for the amount, if any, due on the mortgage debt over and above the amount realized on the sale of the land. For the accomplishment of the first of these objects, it is requisite that all persons having interests, liens, or claims in the property subordinate to the mortgage be made parties; and, for the accomplishment of the second purpose, it is proper to make parties, also, all those persons who are personally obligated to pay the mortgage debt. It is also possible, in some foreclosure suits, and often expedient, to join as parties persons who have claims upon the land superior to that of the mortgage which is being foreclosed. The result of all these rules and requirements is the natural division of all the parties defendant in a foreclosure suit into two classes — necessary parties defendant, and proper parties defendant. A word as to each of these.

§ 547. **Necessary Parties Defendant.** — It is clear from the above statements that the necessary parties defendant are all those persons who have any interests, liens, or claims in the property, inferior and subordinate to the mortgage. That is, those whose rights or interests entitle them to redeem from the mortgage should be cut off and extinguished in the process of its foreclosure.¹ Such are the mortgagor, if he still remain the owner of the land subject to the mortgage, and his wife, if she joined in the making of the mortgage, or if for any other reason the mortgagee's lien or interest is superior to her right of dower.² Such, also, are inferior or subsequent mortgagees, judgment creditors, mechanics' lienors, and subsequent purchasers and lessees of the land.³ When the land has been sold by the mortgagor after the making of the mortgage, he is no longer a necessary party; and, if his wife united in the deed with him, or otherwise relinquished her entire dower right, she is no longer needed as a party.⁴

When the land is owned subject to the mortgage by some persons having a present interest, and others having future or

¹ Wiltsie, Mort. Forecl. § 116

² Terrell v. Allison, 21 Wall. (88 U. S.) 289, 292; Raynor v. Selmes, 52 N. Y. 579; Bigelow v. Bush, 6 Paige (N. Y.), 343; Kirsheedy v. Union Dime Sav. Inst., 118 N. Y. 358; Nelson v. Brown, 144 N. Y. 384, 389; Andrews v. Stelle, 22 N. J. Eq. 478; Watts v. Julien, 122 Ind. 124; Mills v. Van Voorhies, 20 N. Y. 412; Swan v. Wiswall,

15 Pick. (Mass.) 126; Thomas, Mort. § 731; Wiltsie, Mort. Forecl. §§ 135, 136.

³ Brainard v. Cooper, 10 N. Y. 356; Moulton v. Cornish, 138 N. Y. 133; Van Hattan v. Scholl, 1 N. Y. Misc. 32; Goodman v. White, 26 Conn. 317; Harris v. Hooper, 50 Md. 537; Wiltsie, Mort. Forecl. ch. vii.

⁴ Last preceding note but one.

contingent interests, the former are necessary parties, and those of the latter *who have the first vested estate of inheritance*, and all intermediate owners if any; but beyond this it is not usually necessary to go in regard to the future interests. Thus, if subordinate to the mortgage the land be owned by A for life, then to go to B and his heirs, but if B die without children, then over to the issue of C, A and B are the only ones of these persons who are necessary parties defendant, since they two represent the present existing estate and the first vested estate of inheritance. This is the settled rule in most of the states as to parties who represent future interests.¹

When the land owned subject to the mortgage is held in trust, the trustee as such is a necessary party defendant; and so also are the *cestuis que trustent*, who are in being and ascertainable, and when they are not so numerous as to induce the court to omit them in order to make a foreclosure reasonably practicable.²

§ 548. **Proper Parties Defendant.** — It is also apparent, from the last preceding paragraph but one, that all those persons who are obligated to pay the mortgage debt, such, for example, as the mortgagor who gave also a bond or other personal promise to pay the debt, though he may have sold the land after giving the mortgage, and all persons who have assumed the mortgage debt, and bound themselves to pay the same, are *proper parties defendant*, although they may not be needed as defendants for the purpose of divesting them of any interest in the land. Thus, if A were a mortgagor who had also given a bond for the debt, and he had sold the land to B who assumed the mortgage, and then B had sold to C who also assumed the mortgage, and C had sold to D who did likewise, A, B, and C, being personally liable, would be proper parties defendant. Although they have no interest in the land to be foreclosed, yet if it fail to sell for enough to pay the debt, in many of the states, such, for example, as New York, a money judgment may be entered against them in the same action

¹ Lloyd v. Johnson, 9 Ves. 37; Clark v. Reyburn, 8 Wall. (75 U. S.) 318; Eagle Fire Ins. Co. v. Cammet, 2 Edw. Ch. (N. Y.) 127; Brevoort v. Brevoort, 70 N. Y. 136; Lahey v. Kortright, 132 N. Y. 450, 458; Iowa L. & T. Co. v. King, 58 Iowa, 598; Jones, Mort. § 1401; Wiltsie, Mort. Forecl. § 150. But the interests of contingent, future owners

must be adequately protected by the judgment or decree. Monarque v. Monarque, 80 N. Y. 320.

² First Nat. Bk. v. Shuler, 153 N. Y. 163; McGuckin v. Milbank, 83 Hun (N. Y.), 473, 475; Townshend v. Frommer, 125 N. Y. 446; Thomas, Mort. §§ 735-738; Wiltsie, Mort. Forecl. § 157.

for the deficiency. They are, therefore, proper parties in such jurisdictions for the purpose of obtaining such judgments.¹

Claimants hostile or superior to the mortgage are not ordinarily proper parties. But, in the foreclosure of a second or other subordinate mortgage, the first mortgagee and other superior lienors are proper, though not necessary, parties defendant. Even when such a superior party's claim is not yet due, he may be required, in such an action, to account and show the exact amount of his claim, in order to give definiteness to the sale on foreclosure, though the sale must be subject to that claim.² When the debt of the prior lienor is not yet due, he can not be barred or foreclosed by proceeding under a subsequent mortgage, unless he elects to take part in such proceeding and allows it to foreclose his claim, as well as that of the inferior mortgagee. And if he elect to act in this manner, his prior claim is to be first paid out of the moneys received as the result of the foreclosure sale. When, moreover, his superior lien is due and payable at the time of the foreclosure of the inferior mortgage, he may be made a party for the purpose of compelling a foreclosure of his lien at the same time. This is, in effect, both a foreclosure of the inferior mortgage and a suit to redeem from the superior one.³

§ 549. **Commencing the Action to foreclose.** — Taking as a type the procedure of an ordinary code state, such, for example, as New York, the action is commenced by the service of a summons on at least one of the parties defendant.⁴ The papers to be first prepared for such an action are this summons, a complaint, and, ordinarily at about the same time, a notice of the pendency of the action. Each of these requires a brief separate discussion.

¹ § 522, *supra*; N. Y. Code Civ. Pro. § 1627; *Thorne v. Newby*, 59 How. Pr. (N. Y.) 120; *Jarman v. Wiswall*, 24 N. J. Eq. 267; *Wiltzie, Mort. Forecl.* chs. x, xi.

² *Hagar v. Walker*, 14 How. (55 U. S.) 29; *Nelson v. Brown*, 144 N. Y. 384; *Smith v. Roberts*, 91 N. Y. 470; *Strobe v. Downer*, 13 Wis. 10; *Wiltzie, Mort. Forecl.* § 190.

³ *Jacobs v. Mickle*, 144 N. Y. 237; *Fletcher v. Barber*, 82 Hun (N. Y.), 405; *Ruyter v. Reid*, 121 N. Y. 498; *Raymond v. Holborn*, 23 Wis. 57; *Thomas, Mort.* § 741.

⁴ It would be futile to attempt, in a work of this size, even to give a summary of the numerous ramifications of foreclosure suits in the different jurisdictions. Any useful, feasible outline of such an action must, therefore, be based on the procedure of some one important state. And so the foreclosure suit in New York is taken as the type. The New York statutes, based on and improving somewhat upon the old method in equity, are chiefly in N. Y. Code Civ. Pro. §§ 1626-1637.

§ 550. **Notice of Pendency of Action.** — The equitable doctrine of *lis pendens* was above explained, as a principle whereby the existence of a suit in equity affecting the title to or possession of a piece of land is notice to all purchasers and encumbrancers of the property after such suit is commenced.¹ It is now uniformly required by statute that, in order to the existence of such notice, a formal paper shall be drawn up, filed, and properly indexed, stating the existence and purpose of the action.² This paper is designated the notice of the pendency of the action. In a foreclosure suit, its requisites are that it shall state the purpose of the action, name and describe the parties thereto, and carefully describe the property affected, and that it shall also state the date of the mortgage which is being foreclosed, the names of the parties to the mortgage, and the time and place of its record.³ This notice must be filed with the clerks of the county or counties in which the land is situated, and must be properly indexed, in a book kept for that purpose, against such names of the parties to the action as are indicated by the plaintiff for that purpose. These are ordinarily all the necessary parties defendant. It is required in New York that this notice shall be filed at least twenty days before application for judgment in the action.⁴ As a matter of right practice, it is ordinarily filed with the complaint at the very beginning of the action; and its filing gives no notice when no complaint is filed.⁵ And the requirement is that a summons shall be served on at least one of the defendants within sixty days after such filing. In New York, a failure thus to serve a summons within such time makes the filing of the notice of the pendency of the action nugatory; and a new one must thereafter be filed in order to make it proper notice to purchasers or encumbrancers of the property, pending the action.⁶

§ 551. **The Summons — Its Service — Appearances.** — In order that any suit in law or equity may be properly conducted, the court must have jurisdiction of the subject-matter and the parties. In most of the states, jurisdiction of a

¹ § 454, *supra*.

² N. Y. Code Civ. Pro. §§ 1670, 1631; Pom. Eq. Jur. § 640; *Smith v. Clark*, 144 U. S. 509. History of the doctrine in New York, Wiltsie, Mort. Forecl. § 306.

³ *Ibid*.

⁴ N. Y. Code Civ. Pro. §§ 1670-1672; Thomas, Mort. §§ 759, 760.

⁵ *Albro v. Blume*, 5 N. Y. App. Div. 309; Thomas, Mort. § 761.

⁶ N. Y. Code Civ. Pro. § 1670; *Cohen v. Ratkowski*, 43 N. Y. App. Div. 196.

mortgage foreclosure belongs only to courts of record sitting in the county in which the land is situated; or, if it be situated in more than one county, sitting in either one of them.¹ This is the outcome of positive statutes. For, since equity acts only *in personam*, in the absence of such statutes a foreclosure suit could be properly conducted in a court of equity, however remote from the land, which had complete jurisdiction of all the parties.²

The jurisdiction of the court over the party or parties plaintiff always exists, of course, by the commencement of the action in that court. The obtaining of the court's jurisdiction over the parties defendant is the most crucial and important part of the foreclosure suit. For, if any necessary party defendant be not properly and completely brought within the court's jurisdiction in the action, such action, as to him, is a nullity; his rights are unaffected by it, and the purchaser at the foreclosure sale obtains an imperfect title in so far as it is affected by those rights.³ In the method of code practice with which we are dealing, the summons is the process of the court used for bringing the parties defendant within its jurisdiction. This is accomplished, either by personal service of the summons upon the party, or by one of the forms of its substituted service,—so called,—or by the party's voluntary appearance in the action and his service (either personally or through his attorney) of a written notice of appearance upon the attorney for the plaintiff.⁴ The personal service of the summons consists in the handing of it to the party within the jurisdiction of the court; i. e., ordinarily within the state in which the land is situated.⁵ The substituted service, which is always pursuant to an order of the court obtained for that purpose, consists either, (a) in the publication of the summons (usually for six successive weeks) in one or more newspapers designated by the court, such publication being designed to give due notice of the actions to parties who are not within the state, or (b) in a personal service of the summons outside

¹ N. Y. Code Civ. § 982; Thomas, Mort. §§ 777, 778; Mead v. Brockner, 82 N. Y. App. Div. 480.

² Mead v. Brockner, 82 N. Y. App. Div. 480, and cases there cited; Eaton v. McCall, 86 Me. 346; 1 Perry on Trusts, § 71.

³ N. Y. Code Civ. Pro. § 1632; Moul-

ton v. Cornish, 138 N. Y. 133; Raynor v. Selmes, 52 N. Y. 579; Watts v. Julian, 122 Ind. 124; Wiltsie, Mort. Forecl. §§ 324-327.

⁴ N. Y. Code Civ. Pro. §§ 416, 424; Thomas, Mort. §§ 779-785.

⁵ Ibid.

of the state, or (c) in a proper mailing of the summons, addressed to a party within the state, who can not be found by the exercise of due diligence, and also a proper fastening of a copy of the summons upon the door or other conspicuous object at his last known place of residence.¹ The most scrupulous care of the attorney for the plaintiff is required, to see to it that all of the parties defendant are properly and completely brought within the jurisdiction of the court by some of these methods. They are then said to have their "day in court;" and, if they fail to redeem the property from the mortgage debt before the foreclosure is complete, all of them who are necessary parties defendant are, by the proper completion of the suit and sale of the land, forever barred and foreclosed of their right to redeem, unless the statute prescribes some definite period for the continuation of such right.²

§ 552. **The Complaint.** — The complaint is required to contain a plain and concise statement of all the facts, without unnecessary repetition. This includes a description of the mortgage, its date, the time and place of its record, and the statement of the fact that default has been made in its payment; also a description of the property covered by the mortgage, and a general description of the parties defendant, whether or not any of them are infants, lunatics, or persons otherwise incapacitated, and a summary of their interests in the property. It should also state whether or not any other action has been brought for the payment of the mortgage debt, and if so, the amount of recovery, if any, as the result of such action.³ The prayer for relief is, in substance, that the mortgage shall be foreclosed and the property sold by the sheriff or a referee to be named by the court, and that the plaintiff be paid the amount of his claim out of the proceeds. There should also be a prayer for a deficiency judgment against the parties personally liable for the payment of the debt, in case the land fail to sell for enough to satisfy the same.⁴

The complaint is to be duly verified and served upon all of the parties defendant, who are personally liable to pay the mortgage debt, and on the attorneys for all other parties who

¹ N. Y. Code Civ. Pro. §§ 435-444; Wiltsie, Mort. Forecl. §§ 243-245, 251, 252.

² § 488, *supra*.

³ N. Y. Code Civ. Pro. §§ 481, 1629;

Thomas, Mort. §§ 790-792; Wiltsie, Mort. Forecl. §§ 274-279.

⁴ Thomas, Mort. § 793; Wiltsie, Mort. Forecl. §§ 292, 293.

properly appear in the action through such attorneys and demand copies of the complaint. It is proper, although not necessary under the code practice in most states, to serve the complaint on *all* the other parties; but it is sufficient, and generally the practice, to serve with the summons simply a notice of the object of the action and of no personal claim, on those parties who are not obligated for the payment of the debt. This notice is a brief description of the mortgage and of the property covered thereby, and a statement that the purpose of the action is to foreclose the mortgage, and that no personal claim is made on the defendant so served.¹

§ 553. **Requirements as to Incapacitated Parties.** — If the plaintiff, or any of the plaintiffs when there are more than one, be under any disability to sue, such as that arising from infancy or insanity, guardians *ad litem* must be appointed for him or them, in the manner prescribed by the statutes, at the beginning of the action. For any defendants who are so incapacitated, guardians *ad litem* are ordinarily obtained, either on their own application or on that of their parents, guardians, or next friends; but, on failure of these persons properly to have such guardians appointed within the time prescribed by the statutes (ordinarily twenty days after the service of the summons), the plaintiff, in order to make his proceeding complete, must himself apply to the court to have such guardians appointed to act for the incapacitated defendants and protect their interests in the suit.²

§ 554. **Proceedings after Above-Described Steps and before Judgment.** — Ordinarily, there is no contest in a foreclosure suit. The guardians for incapacitated defendants file formal answers, submitting the interests of their wards to the care of the court. Other parties frequently file notices of appearance, and demand that all subsequent papers and notices of subsequent steps shall be duly served upon them or upon their attorneys. But there are rarely any answers which raise issues to be tried by the court. If answers be filed raising such issues, they are to be tried and determined ordinarily on the equity side of the court, that is, by one judge

¹ N. Y. Code Civ. Pro. § 423. If the summons be properly served, failure to serve this notice does not invalidate the proceedings, even when no complaint is served. But its due service may save

the plaintiff costs. Thomas, Mort. § 796; Wiltsie, Mort. Forecl. §§ 240, 241.

² N. Y. Code Civ. Pro. §§ 469-472, 428; Wiltsie, Mort. Forecl. §§ 248-252.

sitting without a jury. When such determination has been made in favor of the plaintiff, he is then entitled to judgment accordingly. When, on the other hand, the usual case exists and no issue has been raised by the pleadings and the time of the defendants to raise them has expired, — this time being ordinarily twenty days after completion of due service of the summons, — the plaintiff is entitled to proceed to obtain judgment.¹ The first step in this procedure consists of the so-called reference to compute.

§ 555. **Reference to compute the Amount due — Reference to take Evidence.** — Being entitled to judgment because of the failure of the defendants to raise any issue, the plaintiff's attorney, on due notice — ordinarily about five days — to all the parties who have duly appeared in the action, applies to the court for the appointment of a referee, to be named by the court, to compute the amount due on the mortgage. In making this application, he presents to the court an order prepared for the court's signature, and also an affidavit, duly verified by the attorney himself, which is often designated the affidavit of regularity, although under the code practice it does not need to be as complete and full as the technical "affidavit of regularity" required by the old equity practice in foreclosure. The affidavit thus presented must show to the court that all of the defendants have been duly served with the summons, or have duly appeared in the action; it must state whether or not the whole amount of the mortgage debt is due and payable, and, if not, how much is so due; it must inform the court whether or not any of the parties to the action are infants or absentees, and also state that the complaint and notice of pendency of the action have been duly filed as required by the statutes. He who presents it must also furnish competent and complete evidence (by affidavit) as to how each of the parties defendant has come or been brought within the jurisdiction of the court, that the time to answer and thereby raise issues has expired and that no issue has been raised which requires to be tried by the court.²

§ 556. **Order to compute.** — Acting upon the evidence thus supplied, and on proof being given that the parties who have appeared have had due notice of the application, the court makes the "order to compute" appointing therein a referee for that

¹ Wiltsie, Mort. Forecl. § 438;
Thomas, Mort. §§ 797-800.

² Wiltsie, Mort. Forecl. §§ 441, 442;
Thomas, Mort. § 801.

purpose. This order requires the referee so named, after due notice to the parties who have appeared, to receive evidence (which the plaintiff's attorney is to supply) and compute the amount of principal and interest due on the mortgage. When any of the parties defendant are infants or absentees, the order also requires the referee to take evidence of the facts and circumstances set forth in the complaint, and to examine the plaintiff as to whether or not any payment, and if so how much, has been made on the mortgage debt. The referee, having received such evidence, makes a report to the court of the conclusions arrived at by him; and, if all of the mortgage debt be not due, he is ordinarily required also to report whether or not separate parcels of the land should be sold and in what order.¹

§ 557. **Judgment.** — On the coming in of the report of the referee to compute, and its proper filing, and due notice (ordinarily eight days) to the parties defendant who have appeared, the plaintiff's applies for judgment of foreclosure and sale. The judgment thus obtained should contain a description of the property covered by the mortgage, an order that such property be sold by the sheriff, or by a referee named by the court, a statement that the plaintiff or any other party may become a purchaser at the sale, that the sheriff or referee shall execute a proper deed to the purchaser at the sale, and that out of the purchase-money he shall pay to the plaintiff the amount found to be due on the mortgage, together with costs and expenses to be taxed, or, if the property bring not enough to pay all these, that the amount realized shall be applied for this purpose, and that the purchaser at the foreclosure sale shall be duly let into possession of the property.² It should also contain directions for the disposition of surplus moneys, if any, as by paying them to the county treasurer, and for a money judgment in favor of the plaintiff against the defendants personally liable for the deficiency in case the property fail to sell for enough to pay the mortgage debt. In order to obtain this last described part of the judgment, i. e., "the deficiency judgment," it must have been prayed for specifically in the

¹ N. Y. General Rules of Practice, No. 60; N. Y. Code Civ. Pro. §§ 1636, 1637; Wiltsie, Mort. Forecl. §§ 443-459; Hun's N. Y. Court Rules (1900), pp. 330-348.

² N. Y. Code Civ. Pro. §§ 1626, 1636; N. Y. General Rules of Practice, No. 61; Wiltsie, Mort. Forecl. §§ 460-464; Thomas, Mort. § 820.

complaint, and there must be, in addition to the mortgage, a bond, note, or other promise, on which the parties against whom it is desired to enforce the judgment are personally obligated.¹

§ 558. **Sale.**—Acting as required by the judgment, the sheriff, or the referee therein designated, advertises the property for sale as required by the statute (in New York, once a week for six successive weeks, in a newspaper designated by the court; or, in counties where a daily, semi-weekly, or tri-weekly newspaper is published, twice a week for three successive weeks), sells it at public auction to the highest bidder, and, after a reasonable time for the purchaser to examine the title, delivers to him a deed of the property, receives the purchase-money, pays out of it, if sufficient, the amount due to the plaintiff as designated by the judgment, and disposes of the residue, if any, as also required by the judgment.² Applications for any surplus moneys, by the mortgagor, and any other owners or subordinate lienors, are provided for by the codes; and the proceedings thereon are commonly known as “surplus proceedings.”³

§ 559. **Report of Sale.**—The referee, who thus sells the property and disposes of the purchase-money, should make and file a full report of his proceedings as they occurred in the order above outlined. This report is advisable, and should, if possible, be incorporated in the judgment roll subsequently to be made up by the attorney for the plaintiff. But it is generally held that the proceeding is not defective, and the title of the purchaser is not vitiated, by the fact that such report is never made or filed.⁴

§ 560. **Judgment Roll.**—After all the proceedings above outlined have been duly taken, and the papers required to be employed have been duly filed, as should be done, the attorney for the plaintiff should go to the clerk's office in which they are filed, obtain them all, arrange them in chronological order, fasten them together and have them filed away as con-

¹ Wiltsie, Mort. Forecl. § 204; § 458, *supra*.

² N. Y. Code Civ. Pro. §§ 1434, 1678; N. Y. General Rules of Practice, No. 62, see also rule No. 64, as to filing or recording the mortgage before the deed is delivered, when this has not been already done; Hun's N. Y. Court Rules (1900), pp. 349-369.

* N. Y. Code Civ. Pro. § 1633; N. Y. General Rules of Practice, No. 64; Hun's N. Y. Court Rules (1900), pp. 370-377; Thomas, Mort. §§ 1044-1061; Felts v. Martin, 20 N. Y. App. Div. 60.

⁴ Farrell v. Noel, 17 N. Y. App. Div. 319; Wiltsie, Mort. Forecl. §§ 523-527; Thomas, Mort. § 930.

stituting the judgment roll in the action. Scrupulous care is required in preparing this judgment roll, to incorporate in the proper place in it proof of due service of the summons upon all the parties defendant, or the voluntary appearance and service of notice of appearance by such of them as were not so served. This is the jurisdictional element in the case, on which the title of the purchaser of the property vitally depends.¹

§ 561. **Muniments of Purchaser's Title.** — After a mortgage has been foreclosed as above described, it should not be cancelled of record. The mortgage thus on record, the filed notice of the pendency of the action for its foreclosure and the deed by the referee appointed by the judgment constitute the links in the purchaser's chain of title, by which it is shown to have passed from the mortgagor to such purchaser. The purchaser has obtained by these links or steps the same title which he would have acquired if the mortgagor, at the time of making such mortgage, had deeded all of his interest in the property to such purchaser.²

§ 562. **Redemption after Foreclosure.** — In most jurisdictions, as is true in New York, all right to redeem the property from the mortgage terminates when the foreclosure sale is made complete.³ But, in a few jurisdictions, the mortgagor and those who have interests subordinate to the mortgage are given by statute prescribed periods for redeeming after foreclosure. And in such states the purchaser usually obtains only a certificate of purchase, and not a deed of conveyance, until the time to redeem has expired.⁴

¹ § 551, *supra*.

² N. Y. Code Civ. Pro. § 1632; N. Y. General Rules of Practice, No. 63; Rector, etc. Christ P. E. Church v. Mack, 93 N. Y. 488; Nutt v. Cuming, 155 N. Y. 309, 312; Jaycox v. Smith, 17 N. Y. App. Div. 146, 151.

³ Nutt v. Cuming, 155 N. Y. 309; Ruggles v. First Nat. Bk. of Centreville, 43 Mich. 192; Landell's Appeal, 105

Pa. St. 152; Stevens v. Theatres (1903), 1 Ch. 857; Wiltsie, Mort. Forecl. § 577; § 488, *supra*.

⁴ Stockton v. Dundee Mfg. Co., 22 N. J. Eq. 56; Board of Education v. Franklin, 61 Ga. 303; Davis v. Lansdale, 41 Ind. 399; Thomas, Mort. § 1586; 2 Wash. R. P. (6th ed.) pp. 238-245, pp. *600-*606.

PART V.

ESTATES CLASSIFIED AS TO THE TIME FOR THEIR ENJOYMENT TO BEGIN.

1. PRESENT ESTATES.

2. FUTURE ESTATES.

CHAPTER XXX.

ESTATES PRESENT AND FUTURE — CLASSES OF FUTURE ESTATES.

§ 563. Estates, present and future
— 1. Present estates.

§ 564. 2. Future estates, or estates in expectancy.

§ 565. Leading principles, and classes, of future estates.

§ 563. **Estates, Present and Future.** — 1. **Present Estates.** — Classified, *lastly*, with respect to the time when their owners may begin to enjoy them, estates are, 1. Estates *in præsenti* — present estates; and 2. Estates *in futuro* — future estates, or estates in expectancy. (a) The first of these — the interests that are not only owned at present, but are also owned in such manner as to afford immediate possession, enjoyment, and permanency of the profits to their owners — are the kinds commonly dealt with and had in contemplation in the foregoing chapters. A present estate is the kind of interest most frequently owned and most commonly desired. It presents no questions that have not been discussed in the preceding pages, as far as possible in this treatise.

(a) The New York statute divides estates, from this standpoint, as follows: "Estates, as respects the time of their enjoyment, are divided into estates in possession, and estates in expectancy. An estate which entitles the owner to immediate possession of the property is an estate in possession. An estate in which the right of possession is postponed to a future time is an estate in expectancy." Real Prop. L. § 25, which was formerly 1 R. S. 722, § 7, and 723, § 8.

§ 564. **2. Future Estates, or Estates in Expectancy.** — In these interests the right of possession and enjoyment is postponed to some future time. An estate so owned by A that he can not occupy the property, nor take any income from it, until after the death of B, is future; and so is one for the possession of which he must wait for ten years, or as long as he remains unmarried, or till C comes back from Rome. It has been heretofore remarked that, while personal property is uniformly treated without much thought of different estates in it, upon *estates* in realty the care of the legal professor has always been laboriously expended, with the result that these have come to form the subject-matter of the major part of real property law.¹ Upon no other form of estate has that care been bestowed with such refined, and often even subtle, processes of reasoning as upon that which is expectant or future. The outcome, especially as represented in the various species of remainders and executory interests, often appears intricate and confusing. But the principles on which the results are based are always logical, nor in themselves are they very numerous or difficult; and, with a few of those principles understood historically and borne constantly in mind, the course of the student through the law of future estates need not be irksome. A thorough comprehension of an estate in fee simple — a *phantasm*, or mental picture, of it as necessarily attached to every piece of real property (*object* of ownership) in the world — constant remembrance of the great importance of seisin and the necessity for livery of seisin or its equivalent in the transfer of every freehold interest, and a full appreciation of the nature of a use and its execution by the Statute of Uses, are the few familiar conceptions and requirements to be constantly recurred to, as at the foundation of the system of future estates reared by the medieval common law. A few words as to each of these requirements and conceptions are needed in explaining the classification of expectant estates.

§ 565. **Leading Principles and Classes of Future Estates.** — Undoubtedly the jurists who made our common law of real property conceived of an estate in fee simple, as the philosophers taught them to think of time, as a straight line stretching away to infinity. Every minutest piece of land or tenement must be the starting point of such a line, which must always be continuous and unbroken. If the owner disposed of a part

¹ See § 292, *supra*.

of it only, the law at once invested him, or if he had died his heirs, with the residue, which was still infinite in extent. If he cut it up into numerous pieces, disposing of them consecutively to different persons, and ultimately transferred the fee, — the endless piece, — the line in all its straightness and continuity was unaffected, but had simply passed over to a number of successive owners. If the expression be permissible with reference to a line, each part then rested for support upon that which immediately preceded it, the first or present one starting at the land, the next resting upon it, and so on to the last, which looked to all the others for support and was still infinite in extent. There could be no *hiatus*, no deviation. And though some of the successive owners might be yet unborn or unascertainable, yet the unbroken, continuous, *straight* line, with its parts thus upheld, must always remain and extend to infinity.¹

Again, there must always be a present *seisin* in some living, ascertainable owner of every piece of real property (*object* of ownership) within the realm. The writ or document that issued out of the king's court to commence a real or proprietary action was called briefly the *præcipe*; ² it must be served on some one who was seised of the land in question, and there should be no instant of time when the jurisdiction of the king's court over any piece of property might be suspended because there was no one upon whom that writ could be served. Hence the requirement, as to every foot of land and every tenement, that there must always be some one *seised to the præcipe*.³ When, moreover, any freehold interest in the property was created or transferred, this must be done by *livery of seisin* or its equivalent — the formal ceremony of delivering possession and seisin on or within sight of the land, or, when the property was incorporeal, delivering immediate ownership and control of the rents, profits, or income. Such a ceremony must give *present* seisin of a freehold estate.⁴

¹ Wallach v. Van Riswick, 92 U. S. 202.

² The short designation of the writ by which the right of real property was demanded, and which began with the words, "*Præcipe quod reddat.*" 1 Prest. Est. p. *208.

³ 1 Prest. Est. pp. *206–*208; 2 Poll. & Mait. Hist. Eng. L. (2d ed.) pp. 62, 63.

⁴ Co. Lit. 48 a, 48 b; 2 Blackst. Com. pp. *312–*316; Digby, Hist. Law R. P. (5th ed.) p. 146; Green v. Lister, 8 Cranch (12 U. S.), 229; Sparrow v. Kingman, 1 N. Y. 242, 250. "Seisin is for the men of the thirteenth century a fact; the physical element in it is essential. It can not be transferred by a written instrument, nor by a compromise however solemn, nor even by the

With these principles and practices emphasized every day in the courts, the common-law judges could not entertain for a moment the notion of a freehold estate to spring up in the future, without any precedent estate on which it depended — there could be no livery of seisin of such an interest; nor could they think of one freehold estate arising *in futuro* so as to curtail or prematurely to terminate another — the line must be straight and continuous, and not thus broken in upon. A deed of land simply to A for life, to begin when he subsequently married, was therefore a nullity, as was also a transfer to B and his heirs to take effect in possession so as to defeat C's estate in fee if he ceased to live on the land. Hence the two absolute and far-reaching rules for every future legal estate were that it must be preceded by a prior, particular estate, on which it depended for support, and that it must be a natural continuation (keeping the line straight and unbroken) of that particular estate — must commence where it naturally ended, and not in any way contribute to its termination or diminution. Such a future estate is a reversion, if made by the law; if made by act of the parties, it is a remainder. When A, the owner of an estate in fee, conveys the land to B for life, or for a term of years, the law returns the residue to A as a reversioner. When X conveys, out of his estate in fee, an interest to B for life or for a term of years, and the residue to A, the future estate of A is a remainder. In each case, A's estate is preceded by the temporary, *particular* estate of B, and rests down upon it for support, but does not defeat nor diminish it; but, in the first illustration, A's future estate is a reversion, because made by the law; while in the second it is a remainder, because its creator is X. Before uses affected future estates, the courts would permit no form of them except these two.¹

But estates in uses and trusts, whether freehold or not, controlled as they were by the less technical courts of equity, were always allowed to be created to arise in the future without resting on any precedent or particular estates; or to take effect in derogation of prior interests. The Statute of Uses

judgment of a court." 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 103.

¹ But, as will more fully appear hereafter, especially in the discussion of contingent remainders, the stringent

rules applicable to freehold reversions and remainders were somewhat relaxed by the common-law courts in dealing with future estates less than freehold.

executed these anomalous estates — made the legal estate vest wherever the use vested¹ — and thus afforded a means of indirectly creating future legal interests other than remainders and reversions. Because these do not depend on any particular estate, but simply wait (hung up in the air as it were) to take effect in possession when the designated time arrives or event occurs, they are called executory estates. The three ways by which they ultimately became creatable are, directly by uses, by means of powers which also deal with uses, and by wills, in the form of executory devises, after the enactment of the Statute of Wills, 32 Hen. VIII. ch. I.² Illustrations of them are a deed of land to A for the use of B when he marries, no preceding estate being interposed in the meantime; and a devise of land to A and his heirs, but to leave him — his estate to be *cut short* — and pass to B and his heirs if B return from Rome.

In terse summary, then, future estates are (1) *Reversions*, created by the law and resting for support on prior particular estates which they never curtail, (2) *Remainders*, created by act of the parties, and likewise resting for support on prior particular estates which they never curtail, and (3) *Executory estates*, likewise created by act of the parties, but never resting for support on prior particular estates, — either having no connection whatever with any prior interests, or made to take effect in possession so as to diminish other and previous estates. (a)

(a) By a nomenclature slightly different from that of most common-law writers, but without any material effect in practical results, the New York revisers classified reversions as expectant estates, simply, and employed the expression “future estates,” as embracing only remainders and executory interests. The statutes, which were formerly 1 R. S. 723, §§ 9, 10, and 726, § 42, and are now Real Prop. L. §§ 26, 27, declare: “All expectant estates, except such as are enumerated and defined in this article, have been abolished. Estates in expectancy are divided into, 1. Future estates; and 2. Reversions. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.” From the point of view of possession, which is that from which we are looking at estates in this chapter, a reversion is a *future* estate as well as an expectant one. It is so classified by the New York Court of Appeals, notwithstanding the statute. *Griffin v. Shepard*, 124 N. Y. 70, 75.

¹ See the operation of this famous statute fully explained, §§ 302–304, *supra*.

² See pp. 96–98, *supra*.

CHAPTER XXXI.

(1) REVERSIONS.

§ 566. Reversions defined and explained.

§ 567. Reversions are ordinarily vested estates — Seisin of them.

§ 568. Rights and incidents connected with reversions.

§ 569. Descent of reversions.

§ 570. Fealty — Attornment.

§ 571. Merger of particular estate and reversion.

§ 572. Prescription and adverse possession affecting reversions — Descent-cast.

§ 573. Possibilities of reverter and of forfeiture.

§ 566. **Reversions defined and explained.** — A reversion, being a creature of the law which was largely perfected in simpler times, — as early as the end of the thirteenth century,¹ — is the plainest and least technical of the future estates. It may be defined as a future estate, *created by operation of law*, to take effect in possession in favor of a lessor or a grantor or his heirs, or the heirs of a testator, after the *natural* termination of a prior *particular* estate leased, granted, or devised.² (a) Its distinctive essentials are that it is always created by the law, and always rests upon a prior particular estate which it never defeats or abridges. A reversion comes into being whenever an owner of real property conveys only an interest in it less than his own. And the logical common-law conception of it, which also explains and harmonizes the decisions, is that it is not only a creation of law, but also a *returning* by the law to him of a portion of that which he owned before and in reality has never lost. Thus, if A, owning an estate for ten

(a) The New York statutory definition is: "A reversion is the residue of an estate left in the grantor or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised."

¹ 2 Poll. & Mait. Hist. Eng. L. (2d ed.) p. 21.

² P. 94, *supra*. "A reversion," says Coke, "is where the residue of the

estate always doth continue in him that made the particular estate." Co Lit. 22 c.

years, sublet it to B for six, B obtains his term by act of A ; and A, then and in that transaction, acquires by operation of law the residuary four years' interest as a portion of "the old estate, which was originally in him, and never yet was out of him."¹

It follows that a reversion may be made from any estate — by disposing of a lesser interest as a particular one,² and that it may exist after any number of estates which together do not constitute a fee.³ The owner of a fee simple, after disposing from it of numerous estates for years, for life, or in tail, still has the reversion in fee simple ; a life tenant, on alienating the property for years or for the life of another, has a reversion for the residue of his own life (while he lives, the law always contemplates that there will be such a residue), and a lessor of a ten days' interest, subletting for nine days, has a one-day reversion. When, however, out of a fee simple, a fee on limitation or on condition is granted, that which is left for the grantor is not a reversion, but a mere possibility of reverter, or of forfeiture, as heretofore explained,⁴ and again noticed hereafter.⁵

§ 567. — **Reversions are ordinarily Vested Estates — Seisin of them.** — A reversion is rarely a contingent or uncertain estate, but usually vested, i. e., there is a present, fixed ownership of it, although the possession is postponed to the future. The landlord, whose tenant is to hold the farm for fifty years, owns the residue as a present, certain property interest ; and the old man, who has conveyed his land that he held in fee to a young man during the latter's life, now owns the reversion in fee, although he may not live to possess again the property.⁶

Furthermore, whenever the particular estate is less than freehold, and has been carved out of a freehold interest, the reversioner remains *seised* of the property. The owner of the precedent estate, not being a freeholder, obtains only possession ; and the seisin is retained by the reversioner. But in no proper or logical sense can one be said to be seised who owns only a reversion after an estate of freehold ; the seisin resides in such cases in the freehold particular tenant.⁷ If A, the

¹ 2 Blackst. Com. p. *176 ; Leake, Land Law, 315.

² Cruise, Dig. tit. xvii. §§ 7-10.

³ Ibid.

⁴ §§ 426, 430, *supra*.

⁵ § 573, *infra*.

⁶ Barber v. Brundage, 169 N. Y. 368. As to possible, contingent reversions, see Chaplin, Susp. Pow. Alien., § 129, citing Floyd v. Carow, 88 N. Y. 560.

⁷ Ibid. ; Wrotesley v. Adams, Plowd.

owner of two parcels of land in fee simple, lease one to B for twenty years, and grant the other to C for life; manifestly he keeps the seisin of the first because it can not reside in B, a mere tenant for years, while that of the second passes to C, the life-owner, and remains with him as long as his estate continues.

§ 568. **Rights and Incidents connected with Reversions.** — From the two characteristics of a reversion explained in the preceding section, — that it is a vested estate, and its owner is seised when the particular estate is less than freehold, — its familiar incidents naturally flow. Being a vested interest, the common law permits it to be aliened, or mortgaged, or released to the particular tenant, or taken for the debts of its owner.¹ It may be devised by his will, or if a fee in quantity descend to his heirs on his dying intestate; or, if an estate for years in quantity, — a chattel real, — it may, on his so dying, pass to his personal representatives.² A common-law technicality as to its descent is explained in the following section.

The right of a claimant of curtesy or dower out of such an interest is settled (if the other ordinary requisites exist) by the answer to the question, was the deceased spouse *seised of an estate of inheritance during the coverture*? Neither of those legal life estates can be acquired out of an interest that was only for years or for life, whether present or future. And, if the deceased husband or wife never owned any estate in the property except a reversion after a *freehold* interest, there can be no dower nor curtesy, because the seisin was all the time in the owner of the particular estate. When A has an estate for years in a piece of land of which B owns the reversion in fee simple, B's wife has dower, because he is *seised* of an estate of inheritance. But, if, while A was enjoying an estate for his life, B, the reversioner in fee, should marry, and then

187, 191; *Vanderheyden v. Crandall*, 2 Denio (N. Y.), 9; *Moore v. Rake*, 26 N. J. L. 574; *Digby*, Hist. Law R. P. (5th ed.) p. 260.

¹ *Cruise*, Dig. tit. xvii. §§ 16, 18, 28. At common law, when the particular estate is freehold in quantity, since the reversioner then has no seisin of which he can make livery, his only method of transferring a freehold reversion is by *grant*. But, when the precedent estate

is less than freehold, the transfer may be by livery of seisin, if the particular owner will permit the parties to come upon the land. *Digby*, Hist. Law R. P. (5th ed.) pp. 260, 261; *Jones v. Roe d. Perry*, 3 T. R. 88, 93; *Woodgate v. Fleet*, 44 N. Y. 1.

² *Ibid.*; *Cook v. Hammond*, 4 Mason (U. S. Cir. Ct.), 467; *Miller v. Miller*, 10 Met. (Mass.) 393; *Vanderheyden v. Crandall*, 2 Denio (N. Y.), 9, 23.

die before A, B's wife could have no power, because her husband was not *seised* during the coverture.¹

The incident of rent, which so commonly belongs to landlords' reversions, and how it may pass with them or be separately disposed of, have been already fully explained.² It needs simply to be added, as to a reversioner's rights, that, by virtue of statutes coming down from those of Marleberge and Gloucester, he is now uniformly enabled to maintain an action for damage so done to the property as to impair his interest, whether the wrongdoer be the holder of the particular estate or a stranger.³ (a)

§ 569. **Descent of Reversions.**—To-day, in England and many of the states of this country, there is no special difficulty or technicality affecting the descent and inheritance of reversions. If an owner in fee of that kind of future interest die intestate, it descends to his heirs, no matter how great or small may be the particular estate on which it depends. But, in many instances, this is because statutes have reversed the common-law maxim, that *non jus sed seisin facit stipitem*—not the right or ownership, but *seisin* determines the stock of descent.

This principle, which rested on a feudal method of presuming blood-relationship from the mere fact of inheritance⁴ and

(a) In New York, "An action for waste lies against a tenant by the courtesy, in dower, for life, or for years, or the assignee of such a tenant, who, during his estate or term, commits waste upon the real property held by him, without a special and lawful written license so to do; or against such a tenant who lets or grants his estate, and, still retaining possession thereof, commits waste without a like license." . . . "A person, seised of" (owning) "an estate in remainder or reversion, may maintain an action founded upon an injury done to the inheritance, notwithstanding any intervening estate for life or for years." Code Civ. Pro. §§ 1651, 1665, which came from 1 R. S. 749, § 8, and 2 R. S. 334, §§ 1, 2. See also Code Civ. Pro. §§ 1652-1659, 1666-1669; *Livingston v. Haywood*, 11 Johns. 429; *Ottinger v. N. Y. El. R. Co.*, 15 N. Y. Supp. 18; *Galway v. Met. El. R. Co.*, 128 N. Y. 132; *Danziger v. Silberthan*, 21 Civ. Pro. Rep. 285.

¹ Greenl. Cruise, Dig. tit. xvii. § 20, and note; 2 Crabb, Real Prop. §§ 1129, 1168; *Bates v. Bates*, 1 Ld. Raym. 326; *Durando v. Durando*, 23 N. Y. 331; *Baker v. Baker*, 167 Mass. 575; *Kenyon v. Kenyon*, 17 R. I. 539.

² §§ 102-110, *supra*.

³ Co. Lit. 214 a, 214 b, 215 a; Stat. of Marleberge, 52 Hen. III. ch. 23

Stat. of Gloucester, 6 Edw. I. ch. 5; 1 Stim. Amer. Stat. L. §§ 1332, 1353; 1 Wash. R. P. (6th ed.) § 301, notes; *Livingston v. Haywood*, 11 Johns. (N. Y.) *429; *Wood v. Griffin*, 46 N. H. 230, 239; *Beers v. Beers*, 21 Mich. 464.

⁴ 4 Kent's Com. p. *386.

was supported by the theory that a reversioner's interest "is the old estate, which was originally in him, and never yet was out of him,"¹ may be illustrated sufficiently for our present purpose by supposing that A, the owner of a lot of land in England in fee simple, devised a life estate to X; and that after A's death his oldest son, B (who there would be entitled to the entire inheritance by the rule of primogeniture), died intestate, and without aliening his interests, while X was living and seised of his life estate. Then, on the death of X, at common law the property must descend to A's heir (who now may be, for example, a younger son, since B is dead), and not to B's heir; for, although B owned the reversion after A's death, yet he never had the *seisin*, because it was then held by X.²

The common law itself recognized several exceptions to this technical maxim; prominent among which was the rule that one who *purchased* a reversion in fee, instead of acquiring it by *descent*, formed a new stock of descent, and his heir could inherit it from him.³ And, of course, when the particular estate was less than freehold, the seisin was uniformly with the reversioner, and readily passed to his heir, thereby making the latter a stock of descent.⁴ It was natural that many modern statutes should do away with the old maxim, and let the heir of *any* owner of a reversioner in fee inherit it from him, whether or not he has ever had the seisin of the property. These, in effect, make the maxim, *non seisinā sed jū facit stipitem*,—not the seisin, but the right or ownership determines the stock of descent.⁵ (a)

(a) The common-law principle in this regard existed in New York under the statutes of descents of 1782 and 1786 (6th Sess. ch. 2; 1 Greenl. L. 205), and down to the taking effect of the Revised Statutes, January 1, 1830. 1 R. S. 751, § 1, 754, § 27. The latter statutes, which made all rights of inheritance depend on ownership rather than seisin, are

¹ 2 Blackst. Com. p. *176.

² 4 Kent's Com. pp. *385, *386; Digby, Hist. Law R. P. (5th ed.) p. 420; Valentine v. Wetherill, 31 Barb. (N. Y.) 655, 658; Miller v. Miller, 10 Met. (Mass.) 393.

³ 4 Kent's Com. p. *486.

⁴ Ibid.; Co. Lit. 15 a; Cook v. Hammond, 4 Mason (U. S. Cir. Ct.), 467.

⁵ 3 & 4 Wm IV. ch. 106, § 1; 3 Kent's Com. p. *388; 1 Stim. Amer. Stat. L. §§ 3100, 3134. "The Inher-

itance Act, 1833," of England "has altered the law in this respect, by providing that descent in every case shall be traced to the last *purchaser*, that is to say, to the person 'who last acquired the land otherwise than by descent.' . . . By this section the person last entitled to the land shall be deemed the purchaser, unless it shall be proved that he inherited it." Digby, Hist. Law R. P. (5th ed.) p. 420, and note 3.

§ 570. **Fealty — Attornment.** — Originating in feudalism, but no longer of feudal character in the United States, there always exists a species of tenure between a reversioner and the owner of the particular estate, in that the latter is the *tenant* of the former, owes him fealty or fidelity, and in particular must not deny his title nor do nor permit anything that will cause its impairment.¹ This fealty is always incident to a reversion, and can not be separated from it as can a rent.²

The common-law reciprocal restriction on the reversioner was that he should not dispose of his interest, so as to bring in a stranger as lord or landlord, without the consent of the tenant, — without his *attornment* to the new reversioner. But the necessity for attornment was abolished in England by the Statutes 4 Anne, ch. 16, §§ 9, 10, and 2 Geo. II. ch. 19, which have been uniformly followed by legislation in the states of this country.³ (a)

§ 571. **Merger of Particular Estate and Reversion.** — The doctrine of merger of estates comes into play most frequently in connection with reversions. For if, without any intervening interest between them, the particular estate and reversion come into the same hands, at the same time and in the same right, then, in the absence of any contrary expression of intent by their owner the lesser is merged and swallowed up in

now found in the Real Property Law, § 280, which begins the article on descent of real property, as follows: "The term 'real property,' as used in this article, includes every estate, interest, and right, legal and equitable, in lands, tenements, and hereditaments, except such as are determined or extinguished by the death of an intestate seised or possessed thereof, *or in any manner entitled thereto*; leases for years, estates for the life of another person; and real property held in trust, not devised by the beneficiary." See *Floyd v. Carow*, 88 N. Y. 560; *Griffeth v. Beecher*, 10 Barb. 433; *Lakey v. Scott*, 15 Weekly Dig. 148.

(a) The English statutes doing away with the necessity for attornment were re-enacted in New York in 1773, 1774, and 1778 (2 J. & V. 281; 1 R. L. 525), and the same laws were copied into the Revised Statutes of 1830. 1 R. S. 739, § 146; *Moffatt v. Smith*, 4 N. Y. 126. The substance of these, continuously retained, is now in the Real Property Law, § 213; and § 194 of the same law, which was formerly 1 R. S. 744, § 3, does away with all possibility of a wrongful attornment's injuring the reversioner. Those statutes are quoted p. 385, note, *supra*.

¹ *Delaney v. Fox*, 2 C. B. n. s. 768; *Goode v. Gaines*, 145 U. S. 141; *Lowe v. Emerson*, 48 Ill. 160; 1 Prest. Est. pp. *207, *208; 6 Amer. Law Rev. 1.

² Co. Lit. 143 a; Wms. Real Prop. p. *117; Gray, Perpetuities, § 22.

³ Digby, Hist. Law R. P. (5th ed.) p. 262; 1 Stim. Amer. Stat. L. §§ 2008, 2009.

the greater.¹ And, when they are both estates for years, the reversion is treated in law as the greater, even when it is the smaller number of years.² Therefore, if A convey to B a life estate out of A's fee, or an estate for years out of A's life estate, and subsequently both interests come to either A or B in the same right, the lesser estate (which was B's) becomes instantly merged and destroyed in the reversion, unless he who thus acquires them manifests a different intent. And, where an owner of land in fee simple created out of it a term of one thousand years in favor of A, and afterwards let B have a succeeding interest of five hundred years, thus making B the immediate reversioner of A (B could not be a remainderman after A, because their estates were created at different times), and by various transfers these two terms subsequently came together in the hands of trustees, it was held that the estate of one thousand years was merged, and they had only the five hundred years' term.³ It seems clear, however, that no court would apply this principle to a subletting of a term for years and a coming together again of the two estates — as if A, owning an estate for fifty years, should sublet for forty, and then buy back the forty years' term. Undoubtedly, there would be no merger in such a case — so as to cut down A's term against the will of his landlord.⁴

§ 572. **Prescription and Adverse Possession affecting Reversions — Descent-cast.** — It has been heretofore explained that a prescriptive easement can not be acquired against a reversioner by adverse enjoyment of a right over land in possession of a temporary holder.⁵ And this is true as to adverse possession of corporeal property as well. The reversioner having no right of immediate possession, enjoyment, or control, the adverse holding is not against him until that right accrues. Adverse holding or enjoyment of land against A, an owner for life or years, might continue for twenty or more years; and

¹ 2 Blackst. Com. p. *177; Cruise, Dig. tit. viii. ch. ii. §§ 36-40; Nicholson v. Halsey, 1 Johns. Ch. (N. Y.) *417.

² Cruise, Dig. tit. viii. ch. ii. §§ 41, 42.

³ Stephens v. Bridges, 6 Madd. 66; Hooker v. Utica, etc. Turnpike Co., 12 Wend. (N. Y.) 371, 373; 3 Prest. Conv. 182, 207. "It may be here remarked that the less estate must always merge in the greater, that is, *greater in quality*;

and, with reference to the subject of the present title, it must be remembered, that the term is *not*, for the purpose of merger, considered greater, according to the extent of its possible *duration* or numerical quantity, *but* from its being the term *in reversion*." Greenl. Cruise, Dig. tit. viii. ch. ii. § 42.

⁴ See 1 Wash. R. P. (6th ed.) § 742, note 1.

⁵ § 161, *supra*.

when A died, or his lease ended, the reversioner would have the right to proceed at any time within the statutory prescriptive period (usually twenty years) thereafter to eject the disseisor or stop the wrongful user.¹

By the technical common-law principle known as *descent-cast*, if a disseisor of land died while in possession, and his heir took his place (the *descent* of the wrongful holding being thus *cast* from the deceased ancestor upon the heir), the right of the disseisee, which had theretofore existed, to make his title again good simply by re-entering on the land was barred, or "tolled" — the descent-cast was said to toll the entry. He must thereafter resort to an action at law to perfect again his title. But a descent-cast, while the adverse holding was against a particular tenant, did not toll the entry of the reversioner. The latter could perfect his title by entry, as soon as the particular estate ended, notwithstanding the descent-cast. And, as heretofore explained, *all* effects of descent-cast on titles to real property are now abolished by statute in England and generally in the United States.² (a)

§ 573. **Possibilities of Reverter, and of Forfeiture.** — A few words are proper, in closing this chapter, as to mere *possibilities* of regaining properties conveyed in fee of some kind. The expression "possibility of reverter" has been used in a variety of senses. Before the Statute of *Quia Emptores*, it described the chance which a feudal grantor in fee simple (who thus became the lord of the grantee) had of regaining the property, if the grantee, his vassal, violated any of the feudal obligations.³ Before the Statute *De Donis*, it was often used to denote the possibility of regaining the land by one who had conveyed it to another "and the heirs of his body."⁴ It is now very commonly employed to indicate the bare chance that real property may return to one who has conveyed it in fee on limi-

(a) In New York: "The right of a person to the possession of real property is not impaired or affected by a descent being cast, in consequence of the death of a person in possession of the property." Code Civ. Pro. § 374.

¹ Sand v. Church, 152 N. Y. 174; Pierre v. Fernald, 26 Me. 436; Pentland v. Keep, 41 Wis. 490; Wash. Ease. (4th ed.) p. 129.

² Blackst. Com. pp. *196, *197; last two notes to § 286, *supra*; 3 & 4 Wm. IV. ch. 27; 1 Stim. Amer. Stat. L. § 1404.

³ See p. 122, note 4, *supra*.

⁴ After that statute became operative, the interest of such a grantor, he having conveyed away only a fee tail which is less than a fee simple, became a reversion. Digby, Hist. Law R. P. (5th ed.) pp. 225, 226.

tation or fee on condition subsequent.¹ But, as heretofore explained, the mere chance of re-acquiring property conveyed in fee on condition subsequent, — as to A and his heirs if they do not sell intoxicating liquor there, — since the grantor or his heirs will not regain it except by enforcing a *forfeiture* by re-entering if the condition be broken, is more properly described as a “possibility of forfeiture.”²

These possibilities, though they could descend to heirs or be devised, could not be aliened by act *inter vivos* at common law, because this would be to encourage maintenance “and the multiplying of contentions and suits.”³ Any right to sell them must be based on statute. And the modern statutes generally make all these possibilities alienable, except the “possibility of forfeiture,” — the chance of re-entering and regaining property that has been conveyed in fee on condition subsequent. Such a chance may descend to heirs, or be released to the holder of the land subject to the condition; but it can not be aliened by act *inter vivos*; nor can it even be devised away,⁴ (a) except in England and in two or three states with peculiar local statutes, such as Massachusetts and Kentucky.⁵

(a) In note (a), § 426, *supra*, it was explained that the New York law permits the alienation of a right to enter and enforce a forfeiture wherever the condition is incident to a reversion, as in case of conditional estates for years or for life; and also in cases of grants in fee, reserving rent and a right of re-entry for its non-payment. But in no other case can the right to enter and enforce a breach of a condition subsequent attached to an estate in fee — such as A’s right when he has conveyed land to B and his heirs provided they never sell intoxicating liquor there — be aliened *inter vivos*, or devised. It is a “possibility of forfeiture,” which, in the illustration given, A may release to B, or allow to pass to A’s heirs “by representation.” But nothing else can be done with it. *Upington v. Corrigan*, 151 N. Y. 143.

¹ § 430, *supra*; *Nicoll v. N. Y. & E. R. Co.*, 12 N. Y. 121.

² § 426, *supra*; *Upington v. Corrigan*, 151 N. Y. 143.

³ *Miller v. Emans*, 19 N. Y. 384, 390; last two preceding notes.

⁴ *Ibid.*

⁵ *Stearns v. Harris*, 8 Allen (Mass.), 597; *Kenner v. Amer. Contract Co.* 9 Bush (Ky.), 202; § 426, *supra*, and note.

(2) REMAINDERS.

CHAPTER XXXII.

REMAINDERS — EXPLAINED AND CLASSIFIED.

§ 574. Remainders defined and illustrated.

§ 575. Requisites of all remainders.

§ 576. No tenure nor fealty — Successive remainders.

§ 577. Remainders, *a*, vested, and *b*, contingent.

§ 578. Distinctions between vested and contingent remainders.

§ 574. **Remainders defined and illustrated.** — Recurring to the conception of an estate in fee simple as a continuous straight line stretching away to infinity, a remainder may be thought of as a distant portion of that line so made by act of the parties as to rest on and continue naturally from the preceding part. More technically defined, a remainder is a future estate, *made by act of the parties*, to take effect in possession after the *natural* termination of a prior *particular estate* created by the *same transaction*.¹

A remainder, says Coke, is “a remnant of an estate in lands or tenements, expectant on a particular estate created together with the same at one time.”² (*a*) This is the second of the only two forms of future estates originally permitted by the common law — the reversion, as above explained, being the other. If the owner of an estate of any quantity, whether in fee, for life, or for years, grant away a present interest less than his own, and let the *law* restore to him the residue, he has a reversion; but if, in the same act of disposing of the present smaller interest to one, *he* convey the residue, or an

(*a*) Dividing all expectant estates into “1. Future estates; and 2. Reversions,” § 28 of the New York Real Property Law (L. 1896, ch. 547), which was formerly 1 R. S. 723, § 11, declares that, where a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

¹ P. 95, *supra*.

² Co. Lit. 143 a.

immediately succeeding part of it, to another, he creates a remainder.¹ Concrete illustrations of remainders are produced by conveyances, by the owner of a fee; to A for life, remainder to B and his heirs; or to A for ten years, remainder to B for life, and then remainder to C for fifty years, and then remainder to D for life, and finally remainder to E and his heirs; or by a transfer, by a life tenant, to A for twenty years, remainder to C: or by a subletting and assignment, by an owner for one hundred years, to A for ten years, and then remainder to B for fifty years, and then the ultimate remainder of the residue of the term — forty years — to C. In each of these illustrations, A has the present, particular estate, and the other estates are remainders — by the transfer, the land goes out to A, and, instead of reverting at the end of his estates, it “remains” out for B, or for B and then for those who succeed him.²

§ 575. **Requisites of all Remainders.** — In the above definitions, four distinctive characteristics of a remainder are apparent; namely, *first*, it is created by act of the parties; *second*, it is preceded by a particular estate on which it depends; *third*, it is to take effect in possession at the natural termination of the particular estate, and *fourth*, it and the particular estate are created in the same transaction. All of these are requisites of every kind of remainder; and each of them requires a brief, separate explanation.

First. It is the fact that a remainder must be created by act of the parties, and never by operation of law, that distinguishes it from a reversion. They are both future estates, resting for support on a prior interest; but, instead of returning to the grantor or his heirs or assigns, a remainder is caused by contract or convention “to stay out for the benefit of another.”³

Second. The suggestion, already ventured,⁴ that a common-

¹ “The verb *remanere* was a natural contrast to the verb *reverti* or *redire*; the land is to stay out instead of coming back. Both terms were in common use in the English of the thirteenth century, and though we may occasionally see the one where we should expect the other, they are in general used with precision. Land can only ‘revert’ to the donor or to those who represent him as his heirs or assigns: if after the expiration of one estate the land is not

to come back to the donor, but is to stay out for the benefit of another, then it ‘remains’ to that other. Gradually the terms ‘reversion’ and ‘remainder,’ which appear already in Edward I.’s day, are coined and become technical; at a yet later date we hear ‘reversioner’ and ‘remainderman.’” 2 Poll. & Mait. Hist. Eng. Law (2d ed.) p. 21.

² Ibid.

³ Ibid.

⁴ § 565, *supra*.

law future estate represents a distant part of a straight line resting down *for support* on the preceding part is here useful. It must have the support. This preceding interest is "particular," — the *particula*, or little piece, on which the remainder reposes. It must be a definite, certain interest, as for years, or for life, or in tail; but, of course, it could not be a fee simple, for no estate could remain after an infinite fee.¹ Livery of seisin must be made to its owner: if he had a freehold interest, he retained the seisin; otherwise, the seisin, so delivered to him, went past him and on to the first remainderman who had a freehold estate and for whom it was then said to be delivered to the particular tenant. Thus, in a transfer to A for life, remainder to B and his heirs, the livery was to A, and he held the seisin until, at his death, it passed to B. But, on a conveyance to A for ten years, remainder to B for fifteen years, remainder to C for life, remainder to D and his heirs, the seisin, though formally delivered to A, passes at once to C, the first *freehold* remainderman; and he holds it until, at the termination of his life estate, it goes on to D.²

Third. It has been already explained that the line of the successive estates must be at common law continuous and unbroken.³ There must be no *hiatus*, no turning or bending upon itself. The remainder must not only rest on the particular estate *for support*, and take effect in possession, if at all, immediately at its end, but it must also be made to await its *natural* termination. Therefore, a conveyance of land to A for his life, but to leave him if he cease to live there, and then pass to B and his heirs, does not make a remainder in favor of B.⁴ So, a grant to A and his heirs until they cease to live there, and then to B and his heirs, makes no remainder for B, for the reason that a fee is first given to A (a fee on limitation), and the common-law judges thought of the happening of the event (their ceasing to live there) as cutting it off prematurely, instead of allowing it to terminate naturally. But it is to be

¹ It follows also, as of course, that, if the particular estate turn out to have been void or be defeated *ab initio*, as by re-entry of the grantor for condition broken, so that in theory of law there never was any particular estate, there can be no valid remainder. Colthirst v. Bejushin, 1 Plowd. 25; Co. Lit. 49 a; 2 Blackst. Com. p. *166.

² 2 Blackst. Com. pp. *165, *167; Digby, Hist. Law R. P. (5th ed.) pp. 262, 263.

³ § 565, *supra*.

⁴ Such an arrangement, as heretofore shown and hereafter more fully explained, creates a conditional limitation — one of the forms of executory estates. § 431, *supra*, and § 619, *infra*.

noted that an estate given to A (without mentioning his heirs, so that there is no *fee* to be cut off), *until* he ceases to live there, and then to B and his heirs, confers a valid remainder on B. When A ceases to live there, in the last illustration, his estate terminates *naturally* — he has used up all of the estate that was given to him. Therefore, B's estate, since it can not take effect in possession on an event which curtails A's, but waits until A's estate naturally terminates, is good as a remainder.¹ This requisite of remainders is their prominent characteristic, which at common law radically distinguishes them from the executory estates.

Fourth. The remainder and particular estate can not be separately created, but must be made in the same transaction. For, as already explained, the remainder could not be first conveyed, — without any particular estate, — and, “if the particular estate be first created, leaving the reversion in the grantor, any subsequent disposition can be effected only by grant or assignment of the reversion; which is not thereby changed into a remainder, but still retains its character of a reversion, to which the tenure of the particular estate is incident.”²

§ 576. **No Tenure nor Fealty — Successive Remainders.** — There is no tenure nor fealty between a remainderman and the tenant of the particular estate. Both obtain their interests from the same source, and so there is said to be privity between them; but one does not claim from or through the other. Each is to be thought of as owning simply for himself, and having his own independent rights and duties connected with his estate.³ In this respect, also, a remainder differs from a reversion.⁴ Yet the conception must never be lost that, at common law, no matter how many successive remainders there may be — and there is no common-law limit to the number

¹ 1 Prest. Est. pp. *45–*59; 2 Fearn, Cont. Rem. (Smith's ed.) §§ 34–43; Hatfield v. Sneden, 54 N. Y. 280; Hennessy v. Patterson, 85 N. Y. 91; Henderson v. Hunter, 59 Pa. St. 335, 340. The distinction apparent in the illustrations here given is often stated to be that a remainder may follow an estate that is to terminate on a *limitation*, but not one to be ended by breach of *condition*. But it is clear, from the second illustration in the text, that such a statement does not cover the required ground. A remainder can not rest

upon a prior particular estate, either on condition or in *fee* on limitation, nor upon any other estate that is to be made to end *prematurely*. The true basis of differentiation is that stated in the text. See also Digby, Hist. Law R. P. (5th ed.) p. 264, and note 2.

² Leake, Land Law, 318; 2 Blackst. Com. p. *167.

³ Co. Lit. 298 a; Cruise, Dig. tit. xxxix. § 41; Leake, Land Law, 320; Van Deusen v. Young, 29 N. Y. 9.

⁴ § 575, *supra*.

of consecutive lesser estates that may be carved out of a fee simple (*a*) — each one rests for support on that which immediately precedes it, and must take effect in possession, if ever, *immediately* on the *natural* termination of that prior interest.¹

§ 577. **Remainders, *a*, Vested and *b*, Contingent.** — Generally defined, a vested estate is a present, fixed right to present or future enjoyment; and a contingent estate is an uncertain right to future enjoyment. All remainders, by whatever other name some of them may be sometimes also designated, being future estates, are accordingly divided into, *a*, those that are present, fixed rights to future enjoyment, or *vested remainders*, and, *b*, those that are uncertain rights to future enjoyment, or *contingent remainders*.

a. In order to appreciate the scope and limitations of the first of these classes, it is necessary to understand at the outset the three different senses in which the word “*vested*” is frequently used by the law. An estate “vested in possession” is a present estate, as above explained — brought into being, for example, by a conveyance of land to A for life, to begin at once. An estate “vested in interest” is a present, fixed right to, or ownership of, future enjoyment, — illustrated by the interest bestowed upon B, a living, ascertained person, when a grant or devise of realty is made to A for life, remainder to B and his heirs.² A mere “vested right” (not estate) in real property resides in a living, ascertained person, who may possess and enjoy it if some contingent event occur, — such as the right owned by B, when land is given to A for life, remainder to B

(*a*) The New York statute prevents the existence of more than two successive life estates — one in remainder after the other — as follows: “Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, and on the death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created.” Real Prop. L., § 33, which was originally 1 R. S. 723, § 17. This means, for example, that if land be conveyed to A for life, remainder to B for life, remainder to C for life, remainder to D and his heirs, the estates to A, B, and D are valid, that to C is void, and after A and B are dead, D may take possession of the land which he owns in fee simple. *Purdy v. Hayt*, 92 N. Y. 446; *Woodruff v. Cook*, 61 N. Y. 638; *Matter of Moore*, 152 N. Y. 602.

¹ § 575, *supra*.

² *Helck v. Reinheimer*, 105 N. Y. 470. 475, where the growth of a vested

remainder (vested in interest) to a present estate (vested in possession) is explained.

and his heirs if he will agree to live on the land.¹ If lands were conveyed to A for life, remainder to a person not in being or not ascertainable, there would not then be any vested interest or right whatever connected with such remainder. The second of these meanings is alone descriptive of a vested remainder; that is, a vested remainder is one *vested in interest*.²

b. The second estate, in each of the last two illustrations, is a contingent remainder, in which no interest is vested or fixed. That which is owned in those cases is a mere chance, depending on an event as a condition precedent, which may or may not occur. And if now the above cases be all worked out in connection with one piece of land, the different kinds of vestings and contingencies connected with remainders may perhaps be made clearer. For this purpose, suppose the property is conveyed to A for life, remainder to the next mayor of New York City if he will agree to live on the land. The remainder is contingent, and no vested right is connected with it, because its owner is not yet ascertainable. As soon as the next mayor of New York City is inaugurated, a *right* to the land, if he will agree to live there, will vest in him; but the remainder, as such, will continue to be contingent until, if ever, he makes that agreement. If he subsequently make the agreement, i. e., if the condition precedent be performed in his favor, his remainder will then become vested; and then, on the death of A, he will have a present estate in the land,—vested in possession.

§ 578. **Distinctions between Vested and Contingent Remainders.**—For him who has a vested remainder, there is no uncertainty about his *ownership of an interest in the property* (in the land, tenement, or hereditament); for him who has a contingent remainder, there is always such an uncertainty. The moulders of our law conceived of a vested remainder as a *thing*,—a piece of the continuous, infinite straight line that represents a fee,—that is *presently owned*; and of a contingent remainder, as a *chance* of owning such a thing in the future. And, although the latter has long been called an *estate*,³ yet confusion

¹ In this case, no *estate* is vested in B in any sense until he agrees to live on the land. Until then, he owns a *contingent* remainder. But he is a definite, known person, in whom is vested the *right* of acquiring the land if the event occur in his favor. *Roosa v. Harrington*, 171 N. Y. 341; *Sawyer v.*

Cubby, 146 N. Y. 192, 196; *Nellis v. Nellis*, 99 N. Y. 505; *Hennessy v. Patterson*, 85 N. Y. 91.

² *Pearce v. Savage*, 45 Me. 90, 101; *Allen v. Mayfield*, 20 Ind. 293.

³ 2 *Fearne*, Cont. Rem. (Smith's ed.) § 90; 1 *Prest. Est.* pp. *63, *75.

of thought and result will often be avoided by still regarding it as a chance which has been dignified by that appellation. Contingent remainders, says Blackstone, "are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*,"¹ — where its ownership depends on a *condition precedent*, as to either the person who may own or the event on which he may own. All other remainders, — interests (*things*) now owned, — though possession of the property owned is postponed to the future, are vested remainders. We may perhaps clarify this subject, if we simply conclude that a contingent remainder is one dependent on a condition precedent for its *ownership*; and that all other remainders are vested. It follows that a remainder is vested when it is *owned* by a certain, ascertained person who may possibly enjoy it in the future, and the only obstacle to whose immediate possession of the property is the existence of the particular estate.² The interest is unquestionably and uncontingently his; and only his possession of the property (the land, tenement, or hereditament) in which that interest exists, is postponed until the termination of the particular estate.

It is apt to cause ambiguity and confusion of thought to say, as do some writers, that a vested remainder may be partly contingent, in that it may be so limited as possibly to terminate before the particular estate, and so its owner may never enjoy the property. Illustrations of such remainders are found in a devise of land to a young man for his life, remainder to an old man for his life; and in a grant of realty to A for life, remainder to B and his heirs, to be lost, however, if he marry C. In the first of these cases, B's estate will terminate at his death, which is apt to occur before the ending of A's estate by his death; and in the second, if B, who *owns* the remainder in fee, marry C, his estate may terminate because of breach of the condition subsequent (not precedent), and if this occur before A's death, B can never enjoy possession of the land.³ But these are uncertainties as to *possessing* property, an estate or interest in which is *now certainly owned*. There is no contingency or uncertainty about the remainder, the estate, the interest, but only the possibility that one of its incidents, ultimate

¹ 2 Blackst. Com. p. *169.

³ 2 Fearn, Cont. Rem. (Smith's ed.)

² Digby, Hist. Law R. P. (5th ed.) §§ 76-83.

p. 265; Gray, Perpetuities, § 101; 2 Blackst. Com. p. *168.

enjoyment of the land, may not accrue.¹ An acre of land may be granted to A for one thousand years, remainder for life to B, a living person; and the remainder will be vested, because B now *owns* it, and if by any means A's estate should end while B lives (as by forfeiture, for example), B *might* enjoy the property.² Such remainders are not contingent in any proper sense. They are simply determinable or defeasible, the same as are many other property interests, even though vested in possession. The farmer's peaches may rot before he can get them to market; or the fisherman's little strip of upland along the shore may be washed away by the ocean before his nets are mended: but no court would call his interest contingent.

Another cause of obscurity here is the statement, often quoted or substantially reiterated but with emphasis placed on the wrong word, that a remainder is vested in interest when there is a person in being who "would be entitled, by virtue of it, to the actual possession of the lands, if the estate should become the estate in possession, by the determination of all the precedent estates."³ This is Mr. Fearn's careful and accurate statement. But too much stress has frequently been laid on the supposed effect of the termination of the precedent estate; and not enough on the requirement that it shall be "*by virtue of it*," — *the remainder*, — that its owner is to be entitled to possession. It is the *nature of the remainder* that is to be kept in mind. It must be free from all conditions precedent *as to it*, in order to be vested.⁴ Thus, a grant of land to A for life, remainder to B if A have no issue, does not give B a vested remainder at common law, though A have no issue at the time. B's *ownership* of the land depends, not on A's dying, but on his dying *without having had any issue*. By virtue of the nature of B's estate, it will not be vested until that matter — that *condition precedent* — is settled in his favor. His *possession* must await A's death; but his *ownership* must await A's death *without having had any issue*. While A is

¹ Last preceding note.

² Boraston's Case, 3 Rep. 19; Napier v. Sanders, Hutt. 118; Wms. R. P. p. *252.

³ Such statements are in themselves correct, and were properly understood, of course, by the eminent authorities who have employed them. See 1 Fearn, Cont. Rem. (Butler's ed.) p. 217 *et seq.*; Wms. R. P. pp. *253, *267; 4 Kent's

Com. p. *202; 1 Prest. Abst. 108. But the form of expression has often led to misconception.

⁴ "It is only because of uncertainties arising from conditions precedent that a remainder becomes contingent that would otherwise be vested." Van Brunt, P. J., in Levy v. Levy, 79 Hun (N. Y.), 290, 294; Chaplin, Susp. Pow. Alien. pp. 36, 37.

living, the latter is the *uncertain event affecting the remainder*, which makes it contingent. To argue that it is vested, because, A now having no issue, B would be entitled to immediate possession of the land if A should die at once, is to lose sight entirely of the nature of the condition. A conveyance to A for life, remainder to B, gives B a vested remainder; but a conveyance to A for life, remainder to B if some event other than the ending of A's estate occur, makes B's remainder contingent until, if ever, that event — that *condition precedent* — occurs.

These are the clear, logical, common-law distinctions between vested and contingent remainders. But, of course, they may be materially modified by legislative definitions, as appears to have been done by the New York statute which is quoted and explained in the following note. (a)

(a) Following closely the words of Mr. Preston, the New York revisers (Jan. 1, 1830) employed the following language in dividing *all future estates* (which by their nomenclature exclude reversions) into vested and contingent: "A future estate is either vested or contingent. It is vested, when there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." Real Prop. Law, § 30, which was originally 1 R. S. 723, § 13. It is worthy of careful note that this definition of a contingent remainder is practically identical with that of Mr. Blackstone which is quoted in the text; and also that this definition of a vested remainder is very closely that of Mr. Preston, who says (1 Prest. Abst. 108): "Every interest which is limited to commence, and is capable of commencing, on the regular determination of the prior particular estate, at whatever time the particular estate may terminate, is in point of law a vested estate."

In the much discussed case of *Moore v. Littel*, 41 N. Y. 66, it was declared that these definitions were intended to produce, and have produced, in New York, a radical change in the distinction between vested and contingent remainders; and that they make a remainder vested *whenever* there is a person in being to whom the property in possession would belong if the particular estate should immediately terminate. In that case, the grant of realty was to John Jackson "for and during his natural life, and after his decease to his heirs and assigns forever." It is explained at § 600, note (a), *infra*, why this made a remainder in New York. John Jackson had children living when the deed took effect; and it was declared by four of the Court of Appeals judges that, although the children were not yet his heirs, — for no one is the heir of a living person, — a *condition precedent*, their outliving their father, must occur in order to make them his heirs; yet they had vested remainders, because they were persons in being who could immediately take the property if he were to die while they were living. This utterance was not a decision, because it was not necessary to the ultimate result at which the Court arrived. But, in the later

case of *House v. Jackson*, 50 N. Y. 161, which arose out of the same deed, the *dictum* of *Moore v. Littel* was treated as law, without further discussion, and followed in a decision to the arrival at which it was necessary. And since then the rule of *Moore v. Littel*, as it has come to be called, has been frequently referred to with approval by the Court of Appeals and the Supreme Court, and called and practically decided to be the law of the state. *Dougherty v. Thompson*, 167 N. Y. 472, 487; *Roosa v. Harrington*, 171 N. Y. 341; *Losey v. Stanley*, 147 N. Y. 560, 567; *Campbell v. Stokes*, 142 N. Y. 23, 30; *Surdam v. Cornell*, 116 N. Y. 305, 309; *Byrnes v. Stilwell*, 103 N. Y. 453, 462; *Manhattan Real Estate Ass'n v. Cudlipp*, 80 App. Div. 532, 536; *Marks v. Halligan*, 61 App. Div. 179, 183; *Peterson v. De Baun*, 36 App. Div. 259; *Minot v. Minot*, 17 App. Div. 521; *McGillis v. McGillis*, 11 App. Div. 359, 363, *aff'd*, 154 N. Y. 532; *Rome Exchange Bk. v. Eames*, 4 Abb. Ct. App. Dec. 83, 98; *Scott v. West*, 63 Wis. 529, 570; *In re Evans' Estate*, 155 Pa. St. 646.

The broad rule of *Moore v. Littel* was sharply questioned in *Hennessy v. Patterson*, 85 N. Y. 91, in which again, however, the utterance was only a *dictum*. Divested of its immaterialities, the devise in the latter case was to the testator's daughter Margaret for her life, and, if she should die without any issue living at her death, to his nephew John Foley. When the case was before the court, John Foley had died, Margaret had subsequently died without issue, and the question discussed was as to the nature of the remainder while both were living. It is clear that while both were living Foley was a person in being who could immediately take the property if Margaret should die at once. Yet the remainder was declared to have been then contingent, because of the uncertainty (the condition precedent) as to whether Margaret would die without issue; and it was suggested that, if the *dictum* of *Moore v. Littel* be law at all (and it was said not to be law), it was meant to apply only to "a remainder to the heirs of one living, and we think does not fairly apply to the case before us." This utterance has also been repeatedly cited with approval; but it does not appear to have overthrown the rule of *Moore v. Littel*. See *Roosa v. Harrington*, 171 N. Y. 341, 353; *Matter of Cramer*, 170 N. Y. 271, 276; *Dougherty v. Thompson*, 167 N. Y. 472, 486; *Hall v. La France F. E. Co.*, 158 N. Y. 570; *Paget v. Melcher*, 156 N. Y. 399; *Griffin v. Shepard*, 124 N. Y. 70, 76; *Van Axte v. Fisher*, 117 N. Y. 401; *Vanderzee v. Slingerland*, 103 N. Y. 47, 55; *Matter of Watts*, 68 App. Div. 357; *Barber v. Brundage*, 50 App. Div. 123, 126.

It seems now to be clear that these legislative definitions have very materially changed the law for New York; and have made the one practical test of a vested remainder that which was formulated by Judge Woodruff, in *Moore v. Littel*: "If you can point to a man, woman, or child, who if the life estate" (particular estate) "should now cease, would *eo instanti et ipso facto* have an immediate right of possession, then the remainder is vested." If all conditions precedent affecting the remainder would be fulfilled in favor of the remainderman by the immediate termination of all the preceding estates, the remainder is vested — a remainder to John after the termination of Margaret's life estate, if she live on the land all her life and die without leaving any issue, is vested while she continuously lives on the land and has no living issue. If this be the law of New York, as it seems to be, the proper method of there dealing with re-

mainders is simply to ask whether or not they are vested according to this easily applied test. If not, they are contingent; and it is useless to be annoyed by any apparent difficulties in logic that may then arise because of the definition of contingent estates. See Chaplin on Suspension of Power of Alienation, pp. 19-36; 1 Columbia Law Rev., pp. 279, 347.

CHAPTER XXXIII.

a. VESTED REMAINDERS.

§ 579. Vested remainders preferred by the courts.

§ 580. Prominent results of the law's preference for vested remainders.

§ 581. (a) Remainders indefeasibly vested.

§ 582. (b) Remainders vested, subject to be divested, simply.

§ 583. (c) Remainders vested,

subject to be partly divested, by opening and letting in other members of the class.

§ 584. (d) Remainders vested, subject to be divested, and also to open and let in other members.

§ 585. Particular estates which may precede vested remainders.

§ 586. Incidents of vested remainders.

§ 579. **Vested Remainders preferred by the Courts.**—The principles heretofore explained are those which ultimately determine whether a remainder is vested or contingent. At common law, if one can truthfully say, "I now own the remainder, with no condition precedent affecting my right or ownership of it, and I could take possession of the property at once if the precedent estates should now terminate," and in New York, if he can truthfully say, "If the particular estate should now terminate, all conditions precedent (if any) would be fulfilled in my favor, and I could immediately take possession of the property," he has a vested remainder.¹ But because of the endless variety of expressions employed, especially by testators, in disposing of property, it is often a nice and difficult question whether or not such a remainder is intended. The fundamental distinction between the two kinds of remainders being kept steadily in mind, this becomes purely a matter of interpretation and construction of the language employed. And here the cardinal rule is that, while the courts will make every reasonably clear expression of a legal intent absolutely decisive, yet, in all cases of *doubtful* construction, they prefer to treat a remainder as vested rather than contingent. This

¹ § 578, *supra*, and note (a).

preference is one of the strong tendencies of the law, being as it is a prominent outcropping of the basal principle that all rights and interests shall be held to be as important and useful as is consistent with the language and circumstances of their creation.¹ Many of the forms and incidents of remainders, as discussed in the following sections, are largely explained by this rule of construction.

§ 580. **Prominent Results of the Law's Preference for Vested Remainders.** — Because of this preference, words of *survivorship*, used in a will in devising a remainder, are held *prima facie* to refer to the time of the death of the testator. Thus, if land be devised "to A for life, remainder to the surviving children of B," this is construed, in the absence of circumstances or expression of testamentary intent to the contrary, as meaning B's children who are living at the testator's death, — surviving *him*, and not A or B, — and so the remainder vests absolutely in those children, if any, when the testator dies and the will takes effect.²

Again, adverbs of time used in limiting remainders are construed, if reasonably possible and fair, as referring to the time when the remainderman is to enjoy the property in possession, rather than to that of the vesting of the interest or ownership. Accordingly, a gift "to my wife during her life, and *from and after* her death to our children," gives the children vested remainders as soon as the instrument of gift becomes operative;³

¹ Boraston's Case, 3 Rep. 19; Doe d. Comberbach v. Perryn, 3 T. R. 484; Croxall v. Shererd, 5 Wall. (72 U. S.) 268, 287; Moore v. Lyons, 25 Wend. (N. Y.) 119; Steinway v. Steinway, 163 N. Y. 183; Wilber v. Wilber, 165 N. Y. 451; Matter of Russell, 168 N. Y. 169; Matter of Cramer, 170 N. Y. 271; Dingley v. Dingley, 5 Mass. 535, 537; Graham v. Houghtalin, 30 N. J. L. 552, 558; Grimmer v. Friederich, 164 Ill. 245; Gillespie v. Allison, 115 N. C. 542. Especially, by being held to be vested, remainders are brought within the class of future interests that are alienable, and not ordinarily liable to be defeated by the forfeiture, surrender, or other form of destruction of the particular estate. Ibid.

² Doe d. Long v. Prigg, 8 Barn. & C. 231; Moore v. Lyons, 25 Wend. (N. Y.)

119; Connelly v. O'Brien, 166 N. Y. 406; Stokes v. Weston, 142 N. Y. 433; Nelson v. Russell, 135 N. Y. 137; Colby v. Duncan, 139 Mass. 398; Bailey v. Hoppin, 12 R. I. 560; Chew's Appeal, 37 Pa. St. 23; Buck v. Lantz, 49 Md. 439; Thorington v. Thorington, 111 Ala. 237. This is not, however, a very emphatic rule of construction; and the presumption that words of survivorship mean surviving the testator is a weak presumption, which easily yields to expressions of a contrary intent. Matter of Cramer, 170 N. Y. 271; Robinson v. Palmer, 90 Me. 246.

³ Clarke v. Cammann, 160 N. Y. 315; Hersee v. Simpson, 154 N. Y. 496; Corse v. Chapman, 153 N. Y. 466; Sawyer v. Cubby, 146 N. Y. 192; Matter of Young, 145 N. Y. 535; Matter of Murphy, 144 N. Y. 557; Wright v.

and a grant to A for life, residue to B and his heirs *when* he becomes twenty-one years of age, confers a vested remainder on B, although he can not take possession of the property till he is twenty-one, even though A should die before that time.¹

It is largely because of this strong preference, also, that we find some forms of these future estates declared by the courts to be vested, although they may possibly be wholly or partly defeated by subsequent occurrences before the termination of the precedent estates, and so may never be enjoyed in possession. It was explained above, for example, that conveyances, to an old man for his life, after an estate to a young man for his life, to a living person for life after a leasehold interest for a long term of years, to A for life and then to B and his heirs provided that if B marry C he is not to have it, and the like, create vested remainders, although the chances of their owners' ever enjoying the lands in possession may be very remote.² And when remainders are given to classes of persons, where the number and *personnel* of the owners are liable to change during the continuance of the particular estate, as to A for life and then to his children who may be living at his death, or to a testator's widow and children for their lives and after they have died "to all my grandchildren," there may be vested remainders, subject to be wholly or partly divested, or to open up and let in as owners other members of the class as they come into being or are ascertained.³ These forms become clear, if we consider all vested remainders in four classes, namely: (a) Those indefeasibly vested; (b) Those vested subject to be divested simply; (c) Those vested subject to be partly divested by the coming in of other members of the class; (d) Those vested subject to be divested wholly or partly and also to let in other members of the class. It may avoid confusion here always to bear in mind that, wherever there is a defeasible or determinable character in any of these forms of

White, 136 Mass. 470; Peterson's Appeal, 88 Pa. St. 397; Byrne v. France, 131 Mo. 639.

¹ And if the estate thus conferred upon B be one of inheritance, and B die before he is twenty-one, it descends to his heirs. Doe d. Morris v. Underdown, Willes, 293; Broomfield v. Crowder, 4 Bos. & P. 313; Boraston's Case, 3 Rep. 19; Clarke v. Cammann, 160 N. Y. 315; Matter of Brown, 154 N. Y.

313; Shannon v. Pentz, 1 N. Y. App. Div. 331; Wardwell v. Hale, 161 Mass. 396; Nelson v. Pomeroy, 64 Conn. 257; Chafee v. Maker, 17 R. I. 739; *In re Walkerly's Estate*, 108 Cal. 627. See Loughheed v. The Dykeman's Baptist Church, 129 N. Y. 211; Kalisch v. Kalisch, 166 N. Y. 368.

² §§ 578, 579, *supra*.

³ See §§ 582-584, *infra*.

vested remainders, it is because of a *condition subsequent* — not precedent. A single, separate illustration will explain each of these classes.

§ 581. (a) **Remainders indefeasibly vested.** — An illustration of this class or form is an estate to A for life, remainder to B, a living, known person, and his heirs forever. Nothing in its nature or limitation is to divest it. B may grant it away before A's death; and if while A is still living B die, he may will it away or let it descend to his heirs.¹ At A's death, it is certain to become an estate vested in possession for B, or his heirs, devisees, or assignees.

§ 582. (b) **Remainders vested, subject to be divested, simply.** — A grant or devise of realty to A for life, remainder to B and his heirs, provided that if B marry C he is not to have it, gives B a remainder that is vested so long as he has not married C, but subject to be divested or defeated upon such marriage, — the breach of a condition subsequent.² So, if the conveyance be to A for life, remainder to B for life, the *nature* of B's interest is such that it may end by his death before A's; and in that sense it is defeasible or determinable.

§ 583. (c) **Remainders vested, subject to be partly divested, by opening and letting in other Members of the Class.** — Where a remainder in fee is given to a fluctuating class of persons, and there are no words of survivorship or other qualification, it vests in the existing members of the class, and opens to let in other members, as they come into being or are ascertained, and to some extent is thereby divested as to the prior owners; but the death of any of them does not divest his interest. An illustration is a devise to the testator's children, and "after they are dead, to all my grandchildren and their heirs." If there were five grandchildren when the testator died, they would each own a vested one-fifth interest in remainder; on the birth of a sixth, each would so own a one-sixth interest, and so on. But if any one of the grandchildren should die before the children of the testator, his interest would not be thereby defeated, but might be disposed of by his will or allowed to descend to his heirs.³ After such an estate vests in possession,

¹ See § 586, *infra*.

² *Matter of Brown*, 154 N. Y. 313; *Chafee v. Maker*, 17 R. I. 739; *Leonard v. Burr*, 18 N. Y. 96; *Lake Superior Co. v. Cunningham*, 155 U. S.

354, 372; *Rose v. Hawley*, 141 N. Y. 366.

³ *Doe d. Long v. Prigg*, 8 Barn. & C. 231; *Haug v. Schumacher*, 166 N. Y. 506; *Matter of Kimberly*, 150 N. Y.

it is no longer subject to open and let in any other members of the class.¹

§ 584. (d) **Remainders vested, subject to be divested, and also to open and let in Other Members.** — To the last-explained form of remainder may be added a condition subsequent, so that total divesting may result, and yet the remainders may not become *per se* contingent. Such is a devise to A, remainder to his children; but, if any child die before A, his share to be divided equally among those who survive A. This remainder vests in the children of A who are living at the time of the testator's death, opens and lets in any other children who may be born to him, and, if any of them die before A, closes down on the survivors. A's children who outlive him are the only ones who ultimately acquire an estate in possession; but all the time after the will operates, while he is living and has children, the remainder is vested.² The case of *House v. Jackson*³ is one of the rare illustrations of the practical distinction between this peculiar, though now quite common, form of vested remainder and one that is contingent. Land had been there so granted that it was held by John Jackson for his life, remainder in equal shares to any of his children who should survive him. One of the children purchased John's life estate; and it was decided by the New York Court of Appeals that that child's wife then had an inchoate right of dower in his share of the property. This was because, the life estate merging in the *vested* remainder to the extent of that child's ownership of it, he became seised in fee of that portion of the property. This could not have occurred if his remainder had been called contingent; for

90, 93; *In re Evans' Estate*, 155 Pa. St. 646; *Security Co. of Hartford v. Cone*, 64 Conn. 579; *Gibbons v. Gibbons*, 140 Mass. 102; *Hinkson v. Lees*, 181 Pa. St. 225; *Adams v. Ross*, 30 N. J. L. 505, 513; *Haggerty v. Harkenberry*, 52 N. J. Eq. 354; *Lariverre v. Rains*, 112 Mich. 276.

¹ *Stevenson v. Lesley*, 70 N. Y. 512, 517.

² *Harrison v. Foreman*, 5 Ves. Jr. 207; *Campbell v. Stokes*, 142 N. Y. 23, 28; *Matter of Seaman*, 147 N. Y. 69; *Moore v. Appleby*, 108 N. Y. 237; *Smith v. Scholtz*, 68 N. Y. 41, 61; *Du Bois v. Ray*, 35 N. Y. 162; *McArthur v. Scott*, 113 U. S. 340; *Blanchard v. Blanchard*, 1 Allen (Mass.), 223; *Collins v. Collins*,

40 Ohio St. 353; *Kemp v. Bradford*, 61 Md. 330.

³ 50 N. Y. 161. This is one of the cases growing out of the deed concerning which it was held, in *Moore v. Littel*, 41 N. Y. 66, that a grant to John Jackson for life, remainder to his heirs, gave vested remainders to his children then living. Such a remainder would be contingent at common law (the children not being "heirs" until their father's death); but, being treated by the New York statutes as a vested remainder, it affords an instructive illustration of the difference between this class of such remainders, to which it must belong, and contingent remainders.

he would not then have *owned* it, it could not have merged any part of the life estate, and so he would have been seised of a life estate only.

This is a border-line class of vested remainders. A slight change in phraseology will readily show that futurity is annexed to the substance of the gift, and so make the remainder contingent. Thus, a devise to A for life, remainder to those of his children who survive him, at common law, postpones the vesting and makes the remainder contingent until A's death;¹ although by the New York *criterion* such a remainder is all the time vested in any existing children of A.² And, in all jurisdictions, where the only form of the gift in a will consists in a *direction to divide* the property among the members of a class at a future time, such as a devise to A for life, with instructions for him to divide the land by his will among his children living at his death, the remainders are contingent.³ These are only rules of *presumption*, however, and they must always yield to an expressed intent of a testator as gathered from a proper construction of the entire will.⁴

§ 585. **Particular Estates which may precede Vested Remainders.** — An estate for years, for life, or in fee tail may precede a vested remainder. The remainder being owned and ready to take effect in possession, all that is needed is that it and the particular estate shall constitute a continuous line of interests, the one to take effect in possession when the other terminates.⁵

§ 586. **Incidents of Vested Remainders.** — The incidents and characteristics of vested remainders explain the common law's preference for them. They are in their nature very much the same as reversions; and are descendible, devisable, and alienable, may be reached for debts of their owners, and are subject to dower and curtesy, and generally to the ordinary incidents of estates in possession.⁶ These incidents must be understood,

¹ Because, by the language employed, surviving A is made a condition precedent to ownership. *Thomson v. Ludington*, 104 Mass. 193; *Robinson v. Palmer*, 90 Me. 246; *Whitesides v. Cooper*, 115 N. C. 570; *Gray, Perpetuities*, § 108.

² § 578, note (a), *supra*.

³ *Matter of Crane*, 164 N. Y. 71; *Lyons v. Ostrander*, 167 N. Y. 135; *Paget v. Melcher*, 156 N. Y. 399; *Rudd v. Cornell*, 171 N. Y. 114.

⁴ *Quade v. Bertsch*, 65 N. Y. App.

Div. 600, *aff'd*, 173 N. Y. 615; *Matter of Baer*, 147 N. Y. 348; *Goebel v. Wolf*, 113 N. Y. 405; *Carr v. Smith*, 25 N. Y. App. Div. 214.

⁵ §§ 565, 575, *supra*.

⁶ *Wimple v. Fonda*, 2 Johns. (N. Y.) 288; *In re Kenyon*, 17 R. I. 149; *Hinkson v. Lees*, 181 Pa. St. 225; *Gardiner v. Guild*, 106 Mass. 25; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *Drake v. Brown*, 68 Pa. St. 223; *Cruise, Dig. tit. xvi. ch. i. § 9*.

of course, as regulated by the nature and extent of the vested remainders themselves, and by the existence or non-existence of seisin of them. Thus, a remainder, not being an estate in possession, could never be transferred by any method of conveyance which required formal livery of seisin, or handing over of possession;¹ and a defeasible or determinable remainder must pass to the alienee, subject to the same condition subsequent, — if owned, for example, by a member of a class who will lose it by his death before the particular estate ends, his alienee takes it subject to the same restriction, that it may be defeated by such death of the alienor. So there is no dower nor curtesy in any remainder when the particular estate is one of freehold, because the remainderman then has no seisin.²

Vested remainders are also governed by the same rules and principles as are reversions, in regard to the rights and remedies of their owners when the property is wasted or injured, or when adverse possession has been held against the preceding tenants.³ But, since the owner of the particular estate does not *hold* under or of the remainderman in any sense, when both interests are estates for years or for life, or otherwise equal in extent and come together in the same hands, the remainder does not merge the particular estate. No merger occurs by their coming together, in the same hands at the same time and in the same right, except when one of them is actually greater than the other; and then, no intention of the owner to the contrary being shown, the smaller of the two merges in the larger.⁴

¹ Last preceding note; 1 Prest. Est. p. *75; *Glidden v. Blodgett*, 38 N. H. 74.

² § 568, *supra*.

³ See § 572, *supra*.

⁴ Co. Lit. 273 b; Cruise, Dig. tit. xxxix. §§ 40-46; 3 Prest. Conv. 201.

CHAPTER XXXIV.

b. CONTINGENT REMAINDERS.

§ 587. Contingent remainders illustrated and classified.

§ 588. *First*. — Both estates affected by the same contingency.

§ 589. Cross-remainders — Within this first class.

§ 590. *Second*. — Only the remainder affected by the contingency.

§ 591. Alternate remainders — Fee with a double aspect — Within this second class.

§ 592. *Third*. — Remainder dependent on a contingent event that may occur too late.

§ 593. Exceptions to this third class.

§ 594. *Fourth*. — The remainderman uncertain.

§ 595. Exceptions to this fourth class.

The Rule in Shelley's Case.

§ 596. Its development and meaning.

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§ 598. Requisites to the operation of the rule.

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§ 600. Stringency of the rule — Its abolition in some states.

Rules Governing Contingent Remainders.

§ 601. The seven rules.

§ 602. *First Rule*. — The event must be legal.

§ 603. *Second Rule*. — The contingency must not be too remote.

§ 604. *Third Rule*. — The event must not curtail the preceding estate.

§ 605. *Fourth Rule*. — Freehold particular estate for freehold contingent remainder.

§ 606. *Fifth Rule*. — Remainder must be vested when particular estate terminates.

§ 607. *Sixth Rule*. — Contingent remainder defeated by destruction of preceding estate.

§ 608. *Seventh Rule*. — Contingent remainders descendible, devisable, and now alienable *inter vivos*.

§ 609. Other incidents of contingent remainders.

§ 587. **Contingent Remainders illustrated and classified.** — Every contingent remainder is an estate on *condition precedent*. "It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."¹(a) An

(a) This is the language of the New York statute, Real Property Law (L. 1896, ch. 547), § 30. And it is a careful and accurate expression of the

¹ 2 Blackst. Com. p. *169; 1 Prest. Est. p. *74; 1 Fearne, Cont. Rem. (Smith's ed.) p. 3; §§ 577, 578, *supra*.

estate to A for life, and then to the oldest son of B, who has no son, or then to the next president of the United States, illustrates a remainder that is contingent because of uncertainty as to the person; and when property is conveyed to A for life, remainder to B if he marry C, and the marriage has not occurred, an instance is afforded of a remainder that is contingent because of uncertainty as to the event.¹ The twofold division of such remainders, thus naturally suggested,—contingency as to the *event*, or as to the *person*,—is at once clear and comprehensive. But, for the purpose of examining and understanding them and their incidents as fully as their importance requires, the more complete, fourfold classification of Mr. Fearne and Mr. Cruise should be understood.² Mr. Fearne says: “We may properly distinguish four sorts of contingent remainders: *First*, Where the remainder depends entirely on a contingent determination of the preceding estate itself. *Secondly*, Where the contingency, on which the remainder is to take effect, is independent of the determination of the preceding estate. *Thirdly*, Where the condition, upon which the remainder is limited, is certain in event, but the determination of the particular estate may happen before it. *Fourthly*, Where the person, to whom the remainder is limited, is not yet ascertained, or not yet in being.”³ An illustration of each of these classes will make it clear. And a good understanding of them will open the way to an appreciation of some prominent and far-reaching principles of the law of future estates.

common-law meaning of such a remainder. But, since the New York courts have made the chief test as to the character of remainders the statutory definition of *vested* remainders, and appear to have settled it that any remainder is vested whenever there is a person in being who could immediately take the property if the particular estate should terminate at once, this description of a contingent remainder must be understood in that state as if it said, “A remainder is contingent while the *person* who would have an immediate right to the possession of the property if the precedent estates should terminate at once, or while the *event* on which it is limited to take effect, remains uncertain.” This may appear to be a strained construction of the definition of the statute. But it is the only one that logically indicates the line of demarkation drawn by the New York courts between vested and contingent remainders. See note (a), § 578, *supra*.

¹ Last preceding note; Thomson v. Ludington, 104 Mass. 193; Roosa v. Harrington, 171 N. Y. 341.

p. 5; Cruise, Dig. tit. xvi. ch. i, §§ 11-21.

² 1 Fearne, Cont. Rem. (Smith's ed.) p. 5.

³ 1 Fearne, Cont. Rem. (Smith's ed.)

§ 588. **First. — Both Estates affected by the Same Contingency.** — In the first of these four classes, one and the same contingent event, if it occur, terminates *naturally* the first (particular) estate and causes the second (the remainder) to vest in possession. An illustration is an estate to A until B returns from Rome, and then to B and his heirs. The event — the return of B — is uncertain; but its happening would affect the interests of both of the parties, terminating A's and causing B's to become vested in possession. (a)

The distinction between such a remainder and an estate on conditional limitation is here to be carefully noted. And it lies in the fact that, in order to make such future interest a contingent remainder, the event which causes it to become vested must be an uncertain one the happening of which also causes the preceding estate to terminate *naturally*. In the above illustration, all that is given to A is an estate *until* B returns from Rome. The event, if it occur, will neither defeat nor curtail A's interest, but will bring it to its *natural end* — the end contemplated in its creation. Had the land been given to A for his life, or for a designated term of years, or in fee, with a proviso that it should leave A, and pass to B if he returned from Rome, B's estate would not have been a remainder, but a conditional limitation; because, while the one event would affect both estates, it would defeat or diminish the first and not bring it to a *natural end*.¹ So, an estate to A *and his heirs until* B returns from Rome, and then to B and his heirs, does not make a remainder for B. For the courts have always treated A's estate in such a case as a *fee* (the infinite line) which is to be *curtailed* by the happening of the event.² This distinction is one of the most important of all those that have affected future estates. For, in a common-law jurisdiction, if the future estate must be called a conditional limitation, it must ordinarily be invalid. Thus, if a feoffment were made of Whiteacre "to A until B returns from Rome, and

(a) Assuming that the remainderman is in being, such a remainder as this, although contingent at common law, would be vested in New York. There is a person in being who could immediately take the property if the precedent estate should now terminate. See note (a), § 578, *supra*.

¹ Greenl. Cruise, Dig. tit. xvi. ch. i, §§ 11, 12; Blackman v. Fysh (1892), 3 Ch. 209; Hatfield v. Sneden, 54 N. Y. 280.

² First Univ. Soc. of North Adams v. Boland, 155 Mass. 171; Hatfield v. Sneden, 54 N. Y. 280; § 430, *supra*.

then to B and his heirs ;” and of Blackacre “to A for his life, but if B return from Rome then at once to B and his heirs ;” a common-law court must have decided that B had a contingent remainder in Whiteacre, and no estate nor right in Blackacre, in which an ineffectual attempt had been made to give him an estate on conditional limitation. The creations of the estates essayed for B sound very much alike ; but, because of the narrow distinction between this form of contingent remainder and a conditional limitation, the first is valid and the second utterly void.¹ Uses, devises, and statutes have largely obliterated this fine distinction.² But it still exists in some jurisdictions ; and even where it has wholly disappeared, it has, nevertheless, made history on which must rest any adequate understanding of the modern resultant law. (a)

§ 589. **Cross-remainders** — **Within this First Class.** — Cross-remainders, properly so called, come within this first class of contingent remainders. They are made by conferring distinct, present, particular estates on two or more persons and providing that, on the termination of any one of these while the others are continuing, the property held by him whose interest so ends shall pass to the other owners. An illustration is a life estate in one lot of land to A, and a similar interest in another lot to B ; and, after the death of that one of them who may die first, both lots to go to the survivor. While both are living, A has a contingent remainder in the lot held by B, and B has a contingent remainder in that held by A. Their remainders cross each other, as it were. And the one contingent event, the death of either before the other, will *naturally* terminate the particular estate of the one so dying, and vest his lot in possession in the other.³ The same kind of result

(a) The New York Real Property Law, §§ 43, 47, makes all the forms of future estates here illustrated good and enforceable, and provides that they shall not be defeated by anything that may happen to or in connection with the preceding interest. But the distinctions in name are still preserved ; and a thorough appreciation of these statutes depends on a comprehension of the common-law differences between remainders and conditional limitations.

¹ Last two preceding notes.

² This is explained hereafter, in the chapters on executory estates. See statutes, 8 & 9 Vict. ch. 106, § 8 ; N. Y. Real Prop. L. (L. 1896, ch. 547) § 47 ; 1 Stim. Amer. Stat. L. § 1403.

³ 1 Prest. Est. p. *94 ; Purdy v. Hayt, 92 N. Y. 446, 454 ; Dana v. Murray, 122 N. Y. 604 ; Dow v. Doyle, 103 Mass. 489 ; Glover v. Stillson, 56 Conn. 316.

emerges when one piece of realty is conveyed for life to two or more persons as tenants in common; and it is provided that, as they die off, the portions of those so dying shall vest for life in the survivors or survivor.¹ And it is quite frequently added, in either of such cases, that, after all but one of such temporary owners have died, the entire property shall belong to him and his heirs — vest in him in fee simple.²

In order to make such arrangements good as *remainders*, care must be taken that no owner's interest shall be curtailed or *prematurely* terminated. When, for example, A and B are made tenants in common of a parcel of land *in fee simple*, and it is provided that on the death of either the survivor shall own the whole property in fee, the attempted gifts over are not remainders but executory interests — they might be properly called, in this illustration, cross conditional limitations.³ (a)

§ 590. **Second. — Only the Remainder affected by the Contingency.** — In this class, the particular estate is definite and fixed, and the remainder alone depends on an event which may or may not happen. An illustration is an estate to A for life, remainder to B if he marry C. While A is living and B has not married C, B has a remainder which is contingent because of the uncertainty as to an event — the marriage — which affects it alone. This is a common and typical form of contin-

(a) In New York, the statute (Real Prop. L. §§ 43, 47) makes such executory limitations as these good, provided they are not more than two in number. Real Prop. L. § 32. And the result of these provisions and § 33 of the same law, which forbids the creation or existence of more than two successive life estates, is that not more than two cross-remainders for life are valid. *Purdy v. Hayt*, 92 N. Y. 446, 451, 452; *Byrnes v. Stilwell*, 103 N. Y. 453, 460; *Benson v. Corbin*, 145 N. Y. 351.

¹ 1 Prest. Est. p. *94; 2 Crabb, R. P. § 2339; Challis, R. P. p. 300.

² Or, of course, the ultimate remainder after the death of all the life owners may be given over to still another person.

³ §§ 431, 565, *supra*. Cross-remainders may be made by either deed or will; but the courts will more readily imply them from the language of wills, and insist that deeds must be explicit in order to bring them into being. *Ashley v. Ashley*, 6 Sim. 358; *Dana v. Murray*, 122 N. Y. 604; *Co. Lit.* 195; *Doe d. Tanner v. Dowell*, 5 T. R. 518. There has been considerable discussion as to

whether or not such remainders for more than two life tenants are valid. But it seems clear that, in the absence of statutory restriction (such, e. g., as in N. Y., where the restriction is to two lives, Real Prop. L. §§ 32, 33), there may be cross-remainders for any number of lives, if all be in being so as not to violate the rule against perpetuities. *Doe d. Georges v. Webb*, 1 Taunt. 234; *Hall v. Priest*, 6 Gray (Mass.), 18; *Dow v. Doyle*, 103 Mass. 489; *Kerr v. Verner*, 66 Pa. St. 326. See *Gilbert v. Witty*, *Cro. Jac.* 655; *Wright v. Holford*, *Cowp.* 31.

gent remainders. By its being explicitly made to depend on an uncertain event, "futuraity is annexed to the substance of the gift" in remainder, although the particular estate is to terminate on another event which is fixed and certain to occur.¹

§ 591. **Alternate Remainders—Fee with a Double Aspect—**
Within this Second Class.—When the disposition or ownership of the property after the natural termination of the particular estate is made to depend on two or more contingencies, so that if one event occur the remainder will belong to one person, if another to another, and so on, alternate remainders are created. And these are simply several contingent remainders, usually of this second class, all dependent on one and the same particular estate, and so limited that as soon as any one of them becomes vested the others disappear.² Such would be a devise to A for life, remainder to B if he marry X; and, if B do not marry X, then remainder to C if he marry X; and, if neither of them marry her, then remainder to D if he marry X. Here there are three contingent, alternate remainders, to vest in that one of B, C, and D who may marry X; and, as soon as either of them marries her (provided this be while A is still living), his remainder becomes vested, and the others are defeated. When remainders in fee have been made in this alternate fashion, the limitation has been described as "*a fee with a double aspect.*"³ In the much discussed case of *Hennessy v. Patterson*,⁴ the part of the gift which illustrates this class of remainders was, in substance, to the testator's daughter Margaret for life; and, if she had issue living at her death, to such issue in fee; but, if she died without leaving any issue, then to John Foley in fee. While Margaret was living and had no issue, the fee, which might ultimately go either to her issue or to John Foley, had a double aspect. And the suggestion is probably pardonable, that, had the testator added other contingencies which might have taken it to one of other possible remaindermen, it would have had a *multiple* aspect.

Here, also, is to be carefully noted that these alternate estates will not be valid remainders, if so made that one is to operate to defeat the other *after that other has vested*. Thus,

¹ Co. Lit. 378 a; 1 Fearne, Cont. Rem. (Smith's ed.) p. 6; *Smith v. Edwards*, 88 N. Y. 92; *Matter of Crane*, 164 N. Y. 71; *Rudd v. Cornell*, 171 N. Y. 114.

² *Loddington v. Kime*, 1 Salk. 224; *Furnish v. Rogers*, 154 Ill. 569; *Taylor v. Taylor*, 63 Pa. St. 481.

³ *Ibid.*

⁴ 85 N. Y. 91.

a devise "to A for life, remainder to B and his heirs, but if B cease to live there after A's death, then to C and his heirs," makes a conditional limitation for C, and not a remainder. It is one estate taking effect in derogation of another. (a) In the above illustrations of valid alternate remainders, they are all to be thought of as ready to begin, if the event happen in their favor, at the natural termination of the one particular estate; and, when the contingency happens for one of them so that it thus begins, the others disappear,—one takes effect as a substitute for the other, and does not defeat it after it has vested. This feature is readily seen to be essential to the existence of valid common-law alternate remainders.¹

§ 592. **Third. — Remainder Dependent on a Certain Event that may occur too late.**—At common law, a remainder must entirely fail if anything stand in the way of the remainderman's taking the property in possession at the natural termination of the particular estate.² Therefore, if a remainder depend on an event which is sure to happen, but may not happen until some time after the ending of the preceding estate, that remainder is contingent. Such are the remainders of Mr. Fearn's third class.³ Here the particular estate is definite and fixed, and the remainder depends on an event sure to happen; but the contingency is in the fact that that event may not occur until some time after the particular estate has terminated. An illustration is an estate to A for life, remainder to B after the death of C. B can not take the property until C dies; and, therefore, he can never take it at all if C outlive A. Not being able in such case to take it when A dies, he loses it,—the

(a) From the preceding notes on the New York statutes, it is clear that those statutes make this form of gift entirely valid. The only restriction is that the ultimate, absolute vesting must not be too remote. That restriction is more fully explained hereafter. See note (a), § 576, *supra*, and § 603, *infra*. Moreover, alternate remainders as here explained are expressly provided for as follows: "Two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly." See *Hennessey v. Patterson*, 85 N. Y. 91, 99; *Van Horne v. Campbell*, 100 N. Y. 287; *Schettler v. Smith*, 41 N. Y. 328.

¹ *Doe d. Herbert v. Selby*, 2 Barn. & Cr. 926; *Buzby's Appeal*, 61 Pa. St. 111; *Den. d. Micheau v. Crawford*, 8 N. J. L. 90; *Francks v. Whitaker*, 116 N. C. 518.

² § 606, *infra*.

³ 1 *Fearne, Cont. Rem.* (Smith's ed.) p. 8; *Boraston's Case*, 3 Rep. 19.

event on which his remainder depends, though sure to occur, does not occur in time to save the property for him.

§ 593. **Exception to this Third Class.**—A conveyance of land to A for five years, remainder to B after the death of A, gives to B a contingent remainder within this third class, because, if A should live longer than the five years, his estate would end before B could take the property. But, if the gift had been to A for eighty or a hundred years, and to B after the death of A, would B's remainder have been then contingent? In favor of a just result, though perhaps at the expense of technical reasoning, it was decided in Lord Derby's Case¹ and in *Napper v. Sanders*² that such a remainder is vested. And it seems safe to state, as a common-law conclusion, that, whenever the first estate is for a term of years, and the remainder is to take effect in possession after the death of a person who is practically sure to die before the term ends, an exception to the third class of contingent remainders is to be recognized; and the remainder is to be treated as vested.³ (a)

§ 594. **Fourth.**—**The Remainderman Uncertain.**—In the fourth and clearest class of contingent remainders, the uncertainty relates to the *person*—because he is not in being, or not yet ascertainable. A remainder to a child of a person who has no child, or to the next president of the United States, or to the

(a) When the remainderman is in being and ascertained, it is clear that in New York all remainders of this third class are vested. There is no uncertainty as to either the person or the event. The remainderman must simply wait until a certain event occurs before he can take possession. And § 48 of the Real Property law, which is quoted in note (a), § 606, *infra*, saves such a remainder from being defeasible by the termination of the particular estate before that event occurs. Therefore, an estate to A for life, or for a term of years, whether long or short, remainder to B after C's death, gives B a vested remainder; and he can take possession of the property after A's estate has ended and C has died, no matter in what order as to time those events may occur. It may be noted that, strictly construed, such an estate is not within the New York definition of either a vested or a contingent remainder. There is no uncertainty as to the person or the event; nor could B take the property while C is living, if the preceding estate should terminate at once. But, in view of the New York emphatic preference for treating remainders as vested, it is manifestly to be placed in that class. It is simply made by the use of an adverb of time, and is not contingent. See § 580, *supra*.

¹ Cited in Lit. Rep. 370.

² Hutton, 118.

³ *Ibid.*; 1 Fearn, Cont. Rem. (Smith's ed.) pp. 20-27; Cruise, Dig.

tit. xvi. ch. iii. § 10; 1 Prest. Est. pp. *80, *81; *Weale v. Lower*, Pollexfen, 54, 67.

heirs of a living person (where the result is unaffected by any statute, such, for example, as that of New York (a)) is an obvious illustration.¹

§ 595. **Exceptions to this Fourth Class.** — A living person has no "heirs," in the proper, technical sense, — *nemo est heres viventis*.² Therefore, an estate "to the heirs of A," a living person, is ordinarily contingent. But such a form of conveyance has brought into the law three exceptions, or qualifications to this fourth class of contingent remainders.

One of these arises from a gift of property by a person to his own heirs. On his death, they take by descent, as being the worthier title (the law's transfer), and not by the gift; and so there is no remainder of any kind.³

Another exception, or rather qualification, is where the context or circumstances show that the grantor or deviser uses the word "heirs" in the popular rather than the technical sense — as *descriptio personæ* — to indicate specific, known individuals, such as the existing children, or other near relatives of the living person named. Thus, a devise "to A for life, remainder to his heirs," gives a *vested* remainder to A's children, whenever it is clear from a proper construction of the entire will that they are the individuals meant by the testator to be the remaindermen.⁴

The third exception arises from a grant or devise, such as "to A for his life, remainder to *his* heirs," — to the heirs of the taker of the particular freehold estate. At common law, no remainder whatever exists, in such a case; but A takes the

(a) It has been already stated that the New York rule seems now to be clear, contrary to that of the common law, that a conveyance to A for his life, remainder to A's heirs, confers vested remainders on any persons in being who would become A's heirs if he should die at once. See § 578, note (a), *supra*.

¹ 1 Fearn, Cont. Rem. (Smith's ed.) p. 8; Hall v. La France Fire Engine Co., 158 N. Y. 570; McGillis v. McGillis, 154 N. Y. 532; Loring v. Eliot, 16 Gray (Mass.), 568, 572; Harriman v. Harriman, 59 N. H. 135; Chapin v. Crow, 147 Ill. 219.

² Broom's Legal Max. p. *522; Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 36; Johnson v. Whiton, 118 Mass. 340, 345.

³ Buckley v. Buckley, 11 Barb. (N. Y.) 43; Gilpin v. Hollingsworth,

3 Md. 190; Cruise, Dig. tit. xvi. ch. i. § 33. The English statute, 3 & 4 Wm. IV. ch. 106, § 3, now makes a *devise* to the testator's heirs take effect as a *devise*; and the result is that the devisees, if given remainders, being ascertained when the will operates, take them as vested remainders.

⁴ 1 Fearn, Cont. Rem. (Smith's ed.) pp. 209-215; Cruise, Dig. tit. xvi. ch. i. § 34; Putnam v. Story, 132 Mass. 205; Haverstick's Appeal, 103 Pa. St. 394.

entire estate in fee simple by virtue of the famous "Rule in Shelley's Case," which is explained in the following sections.

The Rule in Shelley's Case.

§ 596. **Its Development and Meaning.** — In the early times when "fee" was synonymous with "feud" or "fief," a conveyance "to A and his heirs" and one "to A for life, *remainder* to his heirs" were substantially the same. A could only hold the property for life, in either case, and on his death it must descend to his heir. Then, slowly through the centuries, were evolved the present uses of the word "fee," to denote the *quantity* of endless ownership — the continuous straight line of interest stretching away to infinity — and also the owner's absolute power over it, so that he may dispose of it and thus cut off his heirs if he choose.¹ After these changes were complete, the court was asked, in the discussion of a case brought by one Shelley in the time of Lord Coke, is an estate conferred upon "A for life, *remainder* to his heirs," or by use of any equivalent expression, still the same as one "to A and his heirs"? Does the old rule remain, and A take a fee simple by either form of expression, though he may now dispose of it to the exclusion of his heirs? The answer was, "Yes." And the ancient principle thus retained has been known since that time as the Rule in Shelley's Case.² Tersely and inartificially stated, the rule is that a transfer of realty to A for life (or other freehold), and to A's heirs, no matter by what form of words it may be made, confers the entire estate in fee simple on A, and nothing on his heirs: and, similarly, a transfer of realty to A for life and to the heirs of A's body, no matter by what form of words it may be made, confers an estate in fee tail on A, and nothing on his heirs. Thus, a grant "to A and his heirs" gives him a fee simple in the ordinary way; "to A

¹ §§ 251, 276, 278, *supra*.

² Shelley's Case, 1 Rep. 93 b, 104 a; Wms. R. P. pp. *254, *255; 1 Prest. Est. p. *304 *et seq.*; Digby, Hist. Law R. P. (5th ed.) p. 269. Shelley's Case itself simply gave occasion for the reiteration of an ancient principle, which was there so discussed and emphasized by the judges as to be made a famous landmark of law. The most emphatic early decision of the rule was in Provost

of Beverly's Case, Year Book, 40 Edw. III. 9 (A. D. 1367), which is explained in 1 Prest. Est. p. *305. The date of Shelley's Case is 1581, 1 Rep. 93 b; *In re Youman's Will* (1901), 1 Ch. 720. In *Perrin v. Blake*, 1 W. Blackst. 672, a leading case in which the rule is thoroughly discussed, Mr. Justice Blackstone declares that the earliest case in which it was established was in 1325 — 18 Edw. II. fol. 577.

for life, remainder to his heirs" gives him a fee simple by virtue of the rule in Shelley's Case. So, a grant of an estate "to A and the heirs of his body" gives him a fee tail in the ordinary way; "to A for life, remainder to the heirs of his body," gives him a fee tail by virtue of the rule in Shelley's Case. Although *in form* remainders are given to the heirs of the first taker, or to the heirs of his body, yet in effect the gift is all to such first taker; and there are no remainders.¹

§ 597. **Formal Statement of the Rule — Its Operation.** — Chancellor Kent's abridgment of Mr. Preston's formal statement of the rule in Shelley's Case is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder (either with or without the interposition of another estate) of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."² The word "heirs," thus employed, is said to be a word of limitation and not of purchase, i. e., it explains or defines (and in that sense "limits") the quantity of estate which the ancestor takes; and by it the heirs acquire nothing, — they are not purchasers or takers through its use in the instrument.³ If the heirs ever acquire the prop-

¹ The origin of the rule — in the ancient prohibition against alienation by an owner in fee, so as to cut off his heirs, no matter by what form of words he acquired the property — seems quite clear. The reasons for retaining it after that prohibition was removed, have been variously surmised and stated. One reason was undoubtedly the courts' dislike of contingent remainders, and the fact that this rule does away with what would otherwise be a large class of such interests: for a very common form of devise is to the testator's son, and then to that son's heirs; at common law this must make contingent remainders, if any remainders at all; but the operation of the rule is to avoid the existence of any remainders whatever, in such a case, by giving the land in fee to the son. Another suggestion is that it was retained in order to bring the property "into the track of commerce

one generation sooner, by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser." And a directly opposite view, which is a favorite one, is that it was invented as a means of retaining for the lord the beneficial incidents of tenure in the descent of the feud from ancestor to heir; for, if the ancestor should own the land for his life only, and the heir should take by purchase and not by descent from him, some or all of the incidents of relief, wardship, marriage, and escheat might be lost. See 1 Harg. Law Tracts, 568, 572; Wms. R. P. (6th ed.) p. 253, note 1; 1 Fearne, Cont. Rem. pp. 85, 86; Tudor's Lead. Cas. R. P. p. 482.

² 4 Kent's Com. p. *215; 1 Prest. Est. p. *263 *et seq.*

³ 4 Kent's Com. p. *214; 2 Blackst. Com. p. *242; Wms. R. P. (6th ed.) p. 253, note 1.

erty at all, it is because the ancestor does not deed or will it away from them, as he has full power and right to do, but keeps it until his death and lets it descend to them. For example, suppose a lot of land is deeded to A for life, *remainder* to his heirs (or other form of gift to his heirs is used); A owns the entire fee simple, and may immediately sell it so that his heirs will never own any of it: *whereas*, if the rule in Shelley's Case did not exist, A would own a life estate only, and could not deal with any greater interest in the land; and those who would be his heirs if he were to die at once would own in fee simple the remainder, of which A could not deprive them.¹

§ 598. **Requisites to the Operation of the Rule.**—In order that this technical rule shall operate, it is necessary, *in the first place*, that the two formal limitations or transfers shall be made in one and the same transaction. For, if land be simply conveyed to A for life, the grantor is at once given the reversion in fee by operation of law; and a subsequent transfer of the fee to A's heirs disposes of such reversion to them as purchasers (takers by the instrument of transfer to them), and has no effect on A's previously acquired life interest.² *Secondly*, the two estates so dealt with in form must be both legal or both equitable,—interests “of the same legal or equitable quality.”³ Therefore, a devise or deed of land to trustees to hold for A for his life, the legal estate in remainder to go to A's heirs, gives to A an equitable life estate only; and, on his death, his heirs take the property by the will or deed (as purchasers), and not by descent from him.⁴ When both estates are equitable, the rule ordinarily applies. But an exception may exist in the case of executory trusts; for, as heretofore explained, the courts seek in such trusts to work out the settler's intent, regardless of technical principles; and, when he clearly evinces a design of giving to the first taker no more than a life interest in such a trust, the residue may be ulti-

¹ Last preceding note; *In re Youman's Will*, (1901), 1 Ch. 720; *Daniel v. Whartenby*, 17 Wall. (84 U. S.) 639; *Silva v. Hopkinson*, 158 Ill. 386.

² Co. Lit. 299 b; *Moore v. Parker*, 1 Ld. Raym. 37; *Dodson v. Ball*, 60 Pa. St. 492, 497. A will and codicil are one instrument, and constitute one transaction, for this purpose. *Hayes v. Foorde*, 2 W. Blackst. p. *698. See *Sloane v. Stevens*, 107 N. Y. 122.

³ 4 Kent's Com. p. *215; 1 Prest. Est. p. *263; *Van Grutten v. Foxwell* (1897), App. Cas. 658; *Brown v. Wadsworth*, 32 N. Y. App. Div. 423, 168 N. Y. 225.

⁴ *Ibid.*; *Silvester v. Wilson*, 2 T. R. 444; *Adams v. Adams*, 6 Q. B. 860; 50 Albany Law Jour. 360.

mately given, by the trustee, as a valid remainder to that first taker's heirs.¹ *Thirdly*, the remainder (so called) must be to the heirs of the first taker, and to those heirs only. Thus, while a grant to A for life, remainder to A's heirs, gives to him a fee simple, yet a grant to A for life, remainder to B's heirs, or to the heirs of A and B, or even to the heirs of A and his wife (since her heirs may be different from his), confers only a life estate on A, and creates valid remainders over which he has no control.² So, when the limitation is to A for life and then to his "heir" (in the singular), the rule does not apply, and A takes only a life estate: such a transfer comes within the so-called rule in *Archer's Case*.³ *Fourthly*, the word "heirs" must be used in its technical sense, to denote "a class of persons to take in succession, from generation to generation," — the blood-relatives whether near or remote, who could inherit realty, — and not merely as *personæ designatæ*.⁴ For example, a devise to A for life, remainder to his heirs, where it is plain from the context of the will that the testator means A's then living children to be the remaindermen, and employs the word "heirs" simply to point them out, gives to A a life estate only; and his children take by the will remainders, over which he has no control. In such a case, the word "heirs" is used in a colloquial and not an accurate legal sense; and the result is the same as it would have been if the testator had said, for example, that he gave the land "to A for life, and then to A's three children."⁵ *Fifthly*, the first estate (to A in the above illustrations) must be an estate of freehold. For livery of seisin or its equivalent must be made to the feoffee or donee of that estate (A in the illustrations); his heirs not being ascertainable while he is alive, he is the only person in whom the seisin can reside; and, since he must receive and retain the seisin, he must have a freehold estate.⁶ Therefore, at common law, such an attempted conveyance to A for a term of years, or for any other estate less

¹ § 309, *supra*; *Papillon v. Voice*, 2 P. Wms. 471; *Green v. Green*, 23 Wall. (90 U. S.) 486; 1 *Perry on Trusts*, § 359.

² *Fuller v. Chamier*, 2 Eq. Cas. 682, 686; *Mudge v. Hammill*, 21 R. I. 283; *Dawson v. Quinnerly*, 118 N. C. 188.

³ *Archer's Case*, 1 Rep. 63 b; *Evans v. Evans* (1892), 2 Ch. 173; 1 *Leake*, 359.

⁴ 4 *Kent's Com.* p. *215; *Luddington v. Kime*, 1 *Ld. Raym.* 203; *Peirce v. Hubbard*, 152 Pa. St. 18; *Millett v. Ford*, 109 Ind. 159.

⁵ *Ibid.*; *De Vaughn v. Hutchinson*, 165 U. S. 566; *Shoonmaker v. Sheely*, 3 *Denio* (N. Y.), 485; *Jamison v. McWhorter*, 7 *Houst. (Del.)* 242.

⁶ *Co. Lit.* 22 b; *Wms. R. P.* p. *259; *Digby, Hist. Law R. P.* (5th ed.) p. 269.

than freehold, remainder to A's heirs, is utterly void ; neither A nor his heirs take any interest in fee, and there is no estate whatever on which the rule in Shelley's Case can operate.¹

§ 599. **The Rule operates, though Other Estates are interposed.** — When all of the above-described requisites coexist, the rule applies and confers on the ancestor (A in the illustrations) all the interests in form transferred to him and to his heirs, even though other estates are interposed between them. Suppose, for illustration, a conveyance "to A for his life, and after A's death to B for his life, and after B's death to A's heirs." Here A owns a life estate in possession and the fee simple in remainder, and may deed or will away the entire interest in fee simple, except the interjected life estate of B, — all the continuous, infinite, straight line, except the little piece representative of the time during which B may live after A's death.² So, if the gift were to A for life, and then to B for life, and then to C for fifty years, and then to D and the heirs of his body, and then to A's heirs, A would own and could alien all the interests in the property, except the life estate of B, the term of years of C, and the fee tail of D. Likewise, an estate to A for life, remainder to B and the heirs of his body, remainder to C for life, remainder to B's heirs, gives first a life estate to A, then a fee tail and the ultimate remainder in fee simple to B, and a life estate to C interjected between B's two interests, — A may enjoy the property while he lives ; on his death, B may have it in fee tail ; if B's issue run out while C is living, C may then have it for the rest of his life ; and then, after C's death, it will go to B's purchasers or devisees in fee in case he sells it or wills it away, otherwise it will *descend* to his heirs.³

§ 600. **Stringency of the Rule — Its Abolition in Some States.** — The rule in Shelley's Case is a very strong principle of the common law. It is not a rule of construction, for determining the intent or purpose of the maker of an instrument, but an absolute law that must operate whenever the transfer is in

¹ Last preceding note.

² Wms. R. P. pp. * 256 - * 259 ; Digby, Hist. Law R. P. (5th ed.) p. 269 ; 4 Kent's Com. p. * 215 *et seq.*

³ Where a *vested* estate in one person thus exists between two estates owned by another — as B's life interest between A's two estates, where the gift is to A for life, then to B for life, and then

to A's heirs — it keeps the two estates owned by the latter apart, and they do not merge — A owns the two estates as distinct entities ; but if B should die before A, then A's fee would merge his life estate and he would simply own the entire fee simple. *Colson v. Colson*, 2 Atk. 246 ; 1 Fearn, Cont. Rem. p. 29.

form to a person and that same person's heirs as such. Therefore, its operation often defeats the *prima facie* intent, or even the actual, expressed intent of a grantor or testator. His *legal intent*, determined from the assumption that he knew the rule and that he could not violate it, must govern.¹ The result has been, in many cases, especially of devises, that, where the gift has been to one person for life with clear expression of the desire of the donor that such person should not take nor control in any way any interest but a life estate, and then the residue has been given to that same person's "heirs," he has been held to own and have complete control of the entire estate in fee simple, to the exclusion of his heirs. After the court has decided from the language employed that the transfer is to A, and to A's heirs in the technical sense ("heirs" not used as *descriptio personæ*), no expression of a contrary intent will then prevent A from taking a fee simple by virtue of the rule in Shelley's Case.²

This ancient rule, being as it is a part of a complete, harmonious system, is still retained in England and probably a majority of the United States. Prominent among the courts in which it has been vigorously sustained are those of Pennsylvania and Illinois.³ But, in quite a number of the states of this country, such as New York, (a) Massachusetts, Virginia,

(a) The rule in Shelley's Case was operative in New York until January 1, 1830. *Brown v. Wadsworth*, 168 N. Y. 225. It is, therefore, necessary to be understood for the purpose of examining titles back of that date. It was abolished by 1 R. S. 725, § 28, in substantially the following language, which is now Real Property Law (L. 1896, ch. 547), § 44: "Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises is given, the persons who, on the termination of the life estate, are the heirs, or heirs of the body, of such tenant for life, shall take as purchasers, by virtue of the remainder so limited to them." The revisers regarded

¹ *Jordan v. Adams*, 9 C. B. n. s. 483; *Van Grutten v. Foxwell* (1897), App. Cas. 658; *Grimes v. Shirk*, 169 Pa. St. 74; *Tindall v. Miller*, 143 Ind. 337.

² *Ibid.*; *Evans v. Evans* (1892), 2 Ch. 173; *De Vaughn v. Hutchinson*, 165 U. S. 566; *Carpenter v. Van Olinder*, 127 Ill. 42; *Silva v. Hopkinson*, 158 Ill. 386; *Daniel v. Whartenly*, 17 Wall. (84 U. S.) 639; *Trumbull v. Trumbull*, 149 Mass. 200; *Martling v. Martling*, 55 N. J. Eq. 771; *Boutelle v. City Sav. Bk.*, 18 R. I.

177; *Williams v. Knight*, 18 R. I. 333; *Nichols v. Gladden*, 117 N. C. 497. In a few cases it has been held that the rule should not override a testator's expressed intentions. *Wescott v. Binford*, 104 Iowa, 645; *Tingley v. Harris*, 21 R. I. 517; *Smith v. Hastings*, 29 Vt. 240.

³ *Grimes v. Shirk*, 169 Pa. St. 74; *Carpenter v. Van Olinder*, 127 Ill. 42; *Silva v. Hopkinson*, 158 Ill. 386.

Michigan, and California, it has been abolished by statute.¹ And the result is, in such jurisdictions, that, while a conveyance "to A and his heirs" gives him a fee simple, one "to A for life, *remainder* to his heirs," or an equivalent form, gives to A a life estate only; and his heirs take the remainder, not by descent from him, but *as purchasers* through the deed or will by which the conveyance is made.² In New Hampshire, New Jersey, Kansas, Oregon, and perhaps one or two other states, the rule has been abrogated by statute as to gifts by will, but not as to other forms of transfer.³

Rules governing Contingent Remainders.

§ 601. **The Seven Rules.** — The essential nature and different forms of contingent remainders being understood, the principles built up around them by the common law and the rule as artificial and unnecessary, and conceived that its abolition would better effectuate the wishes of testators. See their notes to this section; also *Lytle v. Beveridge*, 58 N. Y. 592, 601.

It was because the rule in *Shelley's Case* did not affect the question, that, in *Moore v. Littel*, 41 N. Y. 66, where the grant was to John Jackson for his life; "and after his decease to his heirs and their assigns," the gift to the heirs could be a remainder. And the anomalous result is to be here again noted that it was declared in that case and decided in *House v. Jackson*, 50 N. Y. 161, that it was a *vested* remainder in the living children of John Jackson. See also *Beardsley v. Hotchkiss*, 96 N. Y. 201, 213; *Johnson v. Brasington*, 86 Hun, 106, 112; *Brown v. Wadsworth*, 168 N. Y. 225; § 578, note (a), *supra*.

¹ N. Y. L. 1896, ch. 547, § 44; Mass. Pub. Stat. 1882, ch. 126, § 4; Va. Code, 1887, § 2423; 2 Howell's Ann. Stat. (Mich.) § 5544; Cal. Civ. Code (1886), § 779; Conn. Gen. Stat. (1888), § 2953; 1 Stim. Amer. Stat. L. § 1406; *Brown v. Wadsworth*, 168 N. Y. 225; *Trumbull v. Trumbull*, 149 Mass. 200; *Barnett v. Barnett*, 104 Cal. 298.

² And, of course, in those of such states where estates tail are also abolished, a transfer of any kind to A for life, remainder to the heirs of his body, gives a life estate only to A, and a fee simple in remainder to his issue. See *Chamblée v. Broughton*, 120 N. C. 170; *Clarkson v. Clarkson*, 125 Mo. 381; *Shoup v. De Long*, 190 Pa. St. 331; N. Y. L. 1896, ch. 547, § 22.

³ N. H. Pub. Stat. ch. 186, § 8; Kan.

Gen. Stat. (1889), § 7256; 2 Hill's Ann. L. (Oreg.) § 3093; 1 Stim. Amer. Stat. L. § 1406. The New Jersey General Statutes (1895), § 10, provide that, if land be *devised* for life, remainder to the devisee's heirs, issue, or heirs of the body, the land, after the death of the devisee for life, shall be vested in his children. And it has been there held that the rule in *Shelley's Case* is thus abolished *only so far as it relates to wills and to the lineal heirs of the devisee for life*: And, where a father devised land to his son for life, with remainder to the son's heirs, the son took only a life estate, if he died leaving any issue surviving him; otherwise he took the fee and might will it away. *Lippencott v. Davis*, 59 N. J. L. 241.

modifications of those principles produced by modern statutes and adjudications can be best understood, perhaps, if summarized in the form of seven rules to which they are reducible. Remembering that a contingent remainder always depends on some *condition precedent*, that a fee simple was conceived of as a *continuous, straight* line of interest stretching away to infinity, and that at common law some one must always be *seised to the præcipe* of every piece of real property, these rules and their modifications may be easily apprehended.

§ 602. **First Rule.** — **The Event must be Legal.** — The first and most obvious of these rules, to be mentioned, is that the contingency must be as to an event that may legally occur. A remainder, for example, to an illegitimate child, if subsequently to be begotten, or to a man and his heirs if he will commit treason or a felony, is manifestly invalid. This is simply the application to remainders of the general principle, heretofore explained, that an estate on condition must fail if it depend on a condition precedent which is impossible or can not be legally performed.¹

§ 603. **Second Rule.** — **The Contingency must not be too Remote.** — One of the principles of scholastic logic was that a double contingency is vicious.² Taken over into the courts, this produced the rule that a remainder could not be validly made to depend on more than one uncertain event. Therefore, it was declared by Lord Coke that an attempted gift in remainder to A's unborn son William must fail, because it could not vest until two contingencies had occurred — the birth of the son, and his being named William.³ This form of the rule, long kept in the courts, as Mr. Williams tells us, by respect to the memory of Lord Coke, is now everywhere discarded. And the contingencies may be double, or multiple, provided they do not postpone the possible vesting of the interest for too long a time — are not too remote — do not produce a perpetuity.⁴ This may be explained, for the present purpose, by saying that the contingencies must not take the possibility of the vesting of the interest beyond lives *in being*, and twenty-one years and the period of gestation of a child in addition. Thus, a remainder to a living person's unborn son William, if he be sound in body and mind, is valid, although it depends on four uncertain

¹ § 420, *supra*.

² Wms. R. P. pp. *272, *273.

³ *Ibid*.

⁴ *Ibid.*; *Cole v. Sewell*, 2 H. L. Cas.

186; *Fife v. Miller*, 165 Pa. St. 612; *Jackson d. Nicoll v. Brown*, 13 Wend. (N. Y.) 437.

events. But a remainder generally to the child of a person not yet in being, or to any generation more distant in the future, is everywhere invalid, because of too great remoteness.¹ These illustrations sufficiently explain the general meaning of this present rule against remoteness of contingent remainders. In its details, it is better understood as one of the expressions of the so-called rule against perpetuities, which is to be hereafter discussed. (*a*)

§ 604. **Third Rule.** — **The Event must not curtail the Preceding Estate.** — One of the absolute requisites of every common-law remainder is that it shall be made to await the *natural termination* of the particular estate.² This requirement is most frequently emphasized in connection with contingent remainders; and it is simply to be recalled at this place as one of the rules by which they are governed. In some states, such as New York, Michigan, Wisconsin, and California, future estates that may take effect in derogation of preceding interests may now be effectually made by any form of transfer or conveyance; and the statutes that make this possible often speak of them as remainders. Where such legislation exists, the nomenclature is largely immaterial. But the common-law accurate name of a future interest which is to abridge a prior one is an estate on conditional limitation. (*b*)

§ 605. **Fourth Rule.** — **Freehold Particular Estate for Freehold Contingent Remainder.** — At common law, a freehold contingent remainder must be supported by a freehold particular estate. Otherwise the seisin would be lost. For if land could

(*a*) In New York, subject to the requirement that the contingencies must not be too remote, — too far in the future, — the statute expressly declares that, "A future estate, otherwise valid, shall not be void on the ground of the improbability of the contingency on which it is limited to take effect." Real Prop. Law, § 42. See also Real Prop. L., § 32; Jackson d. Nicoll v. Brown, 13 Wend. 437; Purdy v. Hayt, 92 N. Y. 446, 456; Booth v. Baptist Church, 126 N. Y. 215, 237; People v. Simonson, 126 N. Y. 209, 307; Allen v. Stevens, 161 N. Y. 122.

(*b*) "Remainder" and "conditional limitation" are used interchangeably by the New York statute, which declares that, "A remainder may be limited on a contingency, which, if it happens, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation." Real Prop. Law, § 43 (originally 1 R. S. 724, § 26), quoted also and discussed, § 434, note (*a*), *supra*.

¹ Hay v. Earl of Coventry, 3 T. R. 83, 86; Duke of Norfolk's Case, 3 Ch. Cas. 1, 29; Jackson d. Nicoll v. Brown,

13 Wend. (N. Y.) 437, 442; Cruise, Dig. tit. xvi. ch. ii. §§ 4-8.

² § 575, *supra*.

be conveyed, for example, to A for ten years, remainder in fee or for life to a person not yet in being, the grantor must part with his seisin, since he transferred a freehold interest; but the seisin could not reside in A, since he would have only a term of years, and of course it could not be in the remainderman not yet in being. Neither could any contingent remainderman have the seisin. Therefore, there must be a present freehold tenant to the *præcipe*, to whom livery of seisin could be made.¹

But a contingent remainder less than freehold could always be supported by a particular estate less than freehold. For in such a case the seisin remains in the grantor or lessor, since it need not and can not accompany either of the estates transferred. Thus, a lease by A to B for ten years, remainder to C, an unascertained person, for twenty years, leaves the reversion in fee and the seisin in A; he remains tenant to the *præcipe*, and all three interests may exist and take effect in their order without violating any technical requirement of the common law.²

In several states of this country, of which New York, Michigan, and Wisconsin are examples, this common-law distinction, as to the necessary support of contingent remainders of freehold estates and of those less than freehold, has been abolished by statute; and either kind may now be created, as vested remainders always could be, to depend on an estate for years.³ (a)

§ 606. **Fifth Rule. — Remainder must be vested when Particular Estate terminates.** — At common law, a remainderman must be able to take the property when the particular estate terminates. Therefore his interest must become vested, if ever, during the continuance of that particular estate, which supports it, or at the time when that estate ends. This is because the two must form a continuous, straight line of interest; and there must be no *hiatus* between them. Accordingly, a gift to A for

(a) "Subject to the provisions of this article," says the New York statute, . . . "a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years." N. Y. Real Prop. Law, § 40, which was originally 1 R. S. 724, § 24. The "provisions of this article" are chiefly those which forbid the contingencies to be too remote, and restrict the number of successive life estates to two in number.

¹ 2 Blackst. Com. p. *171; 1 Prest. Est. pp. *216, *217; Digby, Hist. Law R. P. (5th ed.) p. 267; Goodright v. Cornish, 1 Salk. 226.

² Cruise, Dig. tit. xvi. ch. iii. §§ 11–

13; Corbet v. Stone, T. Raym. 140, 151; Young v. Duke, 5 N. Y. 463.

³ N. Y. Real Prop. L. (L. 1896, ch. 547) § 40; 1 Stim. Amer. Stat. L. § 1424.

life, and one day after his death to his oldest son, confers no remainder on the son. And, if land be conveyed to A for life, and then to B if he marry C, B can not take the property unless he marries C at or before the death of A. When the remainderman was not in being, or the specified event (condition precedent), had not occurred and did not occur at the time of the termination of the precedent estate, the property at once reverted to the grantor or donor, or his heirs, and the remainder was thus entirely defeated. "There must be no interval, or 'mean time,' as Lord Coke expresses it, between the particular estate and the remainder supported by it."¹

Under this rule, it was at one time doubted whether a child *en ventre sa mère* could take property as remainderman, — the particular estate terminating before his birth. Partly by the aid of statutes in England and a number of the United States, and undoubtedly as a common-law matter where legislation has not dealt with it, it is now settled that he can do so.² In favor of treating a remainder as vested rather than contingent, an unborn remainderman is deemed to be alive from the time of his conception, and the remainder is treated as vested in him during his gestation. If he die before birth, or be not born in such a state of maturity that by the laws of physiology he is capable of living, or at his birth fail to comply with any other condition precedent to his taking the property, this shows that it was not vested in him although it had been deemed to be so; otherwise, the particular estate having terminated while he was in his mother's womb, he is entitled at birth to immediate possession of the property.³

By virtue of statutes in several states of this country, of which New York, Michigan, and Wisconsin are illustrations, a contingent remainder, otherwise valid, is not now defeated by

¹ 4 Kent's Com. p. *248; Cogan v. Cogan, Cro. Eliz. 360; Wolfe v. Van Nostrand, 2 N. Y. 436; Campbell v. Rawdon, 18 N. Y. 412, 418.

² Stat. 10 & 11 Wm. III. ch. 16; Reeve v. Long, 1 Salk. 227; Digby, Hist. Law R. P. (5th ed.) p. 267; 1 Stim. Amer. Stat. L. §§ 1413, 2844, 6005; Marsellis v. Thalhimier, 2 Paige Ch. (N. Y.) 35. And this principle is not restricted to cases in which the unborn child is benefited by its application. *In re Burrows* (1895), 2 Ch. 497.

³ Ibid.; Stedfast ex dem. Nicoll v. Nicoll, 3 Johns. Cas. (N. Y.) 18; Barker v. Pearce, 30 Pa. St. 173; Crisfield v. Storr, 36 Md. 129. These cases also show that, after the particular estate ends, the enjoyment of the property until the child is born belongs to the person who would take it if he should not be born; and, at his birth, he who thus has held must account to him for the rents and profits in the meantime.

the fact that it is not vested when the particular estate terminates.¹ In such cases, these statutes give the remainderman a vested estate in possession when he comes into being, or the event occurs in his favor, as the case may be, although the preceding estate may have terminated some time previously.(a)

§ 607. **Sixth Rule. — Contingent Remainders defeated by Destruction of Preceding Estates.** — One of the most important common-law characteristics of a contingent remainder is its liability to destruction by the ending of the particular estate. The remainder *rests on the precedent interest for support*. And, if the latter be forfeited, surrendered, merged, or otherwise destroyed before the former becomes vested, both estates fall together.² This rule rests on the same principle as does the preceding one; but it looks more to the act or omission of the owner of the particular estate in causing a loss of his own interest, and thereby of both estates. Thus, suppose land is granted to A for life, remainder to B and his heirs if he marry C, and before the marriage A surrenders his life interest back to the grantor, or forfeits it for crime or because of breach of some condition; B's remainder is thereby wholly defeated — carried down in the destruction of its support.³ Or, if the conveyance be to A for life, remainder for life to B who is not yet in being, remainder to C and his heirs, and, while B is not yet in being A purchase C's interest or sell his to C, the life estate of A is merged in the fee, — B's intervening contingency

(a) "A remainder valid in its creation," says the New York statute, "shall not be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder was limited to take effect; should such contingency afterward happen, the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period." Real Prop. L. § 48, which was originally 1 R. S. 725, § 34; *Sheridan v. House*, 4 Abb. Ct. App. Dec. 218, 224.

¹ N. Y. L. 1896, ch. 547, § 48; 1 Stim. Amer. Stat. L. § 1426 (B).

² 1 Fearn, Cont. Rem. p. 316 *et seq.*; *Purefoy v. Rogers*, 2 Saund. 380, 386; Digby, Hist. Law R. P. (5th ed.) p. 268.

³ *Ibid.*; *Williams v. Angell*, 7 R. I. 145. A frequent cause of forfeiture of a life estate at common law was an attempted conveyance by its owner of more than his interest, by a common-law transfer, such as a feoffment, — any

conveyance not operating by virtue of the Statute of Uses. This was a "tortious conveyance"; and, on entry being made therefor by the owner of the succeeding vested interest, worked a forfeiture of the life estate. *Ibid.*; Co. Lit. 252 a; 4 Kent's Com. pp. *253-*255; *Archer's Case*, 1 Rep. 63. This ground for forfeiture is now generally abolished by statute.

not being of sufficient strength and importance to prevent this — the particular estate is thereby destroyed, and with it B's contingent remainder.¹ So, if A should suffer the land to be taken and retained by a disseisor, B's contingent remainder in either of the above illustrations would be thereby destroyed.² It is to be carefully noted that it is the *destruction* of A's supporting estate that defeats B's. If A should sell or otherwise dispose of his interest, so that it *remained in existence* though owned by another person claiming through or under him, this would not interfere with B's remainder. And, if while A was living he should recover back his estate from a disseisor, it would then continue to be a valid support for the contingent remainder.³

Much ingenuity was exercised by common-law conveyancers to prevent remainders from being destroyed, while still contingent, by the termination of particular estates. Their successful device was the interposition of "trustees to support contingent remainders." An illustration of this would be an estate to A for life, remainder to X and Y during A's life, as trustees to support the contingent remainder, remainder to the youngest son of B and his heirs. If A should forfeit or otherwise destroy his own interest in the property before B's youngest son was in being, it would pass to X and Y for the rest of A's life, and thus the support of the contingent remainder would be retained.⁴

An English statute has there done away with the liability

¹ Cruise, Dig. tit. xvi. ch. vi. §§ 1-7; Wms. R. P. p. *281; Hooker v. Hooker, Cas. temp. Hardw. 13. The curious result, as explained by these authorities, was that a contingent remainder, not being yet an *estate*, was squeezed out from between the two vested interests by their merger, when these came into the same hands at the same time and in the same right. But an exception to this technical principle arises when the particular estate and contingent remainder are both created by the *same will*, and then the reversion in fee *descends* on the owner of such particular estate. In order to avoid a violation of the clear intent of the testator, the two vested estates are not then allowed to merge; and so the contingent remainder is retained. Crisfield

v. Storr, 36 Md. 129. And the same is the result — no merger — when all three of the estates — the two vested ones and the intervening contingent one — are all created by the same instrument. Bowles' Case, 11 Rep. 80 a; 1 Fearne, Cont. Rem. p. 345.

² Wms. R. P. p. *280; Digby, Hist. Law R. P. (5th ed.) p. 268.

³ Wms. R. P. p. 280; Cruise, Dig. tit. xvi. ch. vi. §§ 33, 34.

⁴ 2 Blackst. Com. p. *171; 4 Kent's Com. p. *256. In such a case, the trustees had vested estates; and, since they held them in trust, the courts of equity would restrain them from doing anything to impair the contingent remainder. Ibid.; Smith v. Packhurst, 3 Atk. 315; Vanderheyden v. Crandall, 2 Denio (N. Y.), 9.

of contingent remainders to be defeated by forfeiture, surrender, or merger of any preceding estate of freehold.¹ And in most of the states of this country statutes have made it impossible for any destruction or determination of the precedent estates to defeat or impair remainders of any kind.² (a)

§ 608. **Seventh Rule.—Contingent Remainders Descendible and Devisable, and now Alienable inter vivos.** — After some uncertainty in their earlier stages, contingent remainders were held to be inheritable, devisable by will, and assignable in equity. So they could be released by deed to any owner in possession of the land, and the release was recognized as valid in the common-law courts.³ But, "to prevent maintenance and the multiplying of contentions and suits," the law courts refused to recognize a conveyance *inter vivos* of such an uncertainty to any one who was not already an owner of some interest and in possession of the property.⁴ And the only method by which they could be legally transferred to strangers was by resort to

(a) Not only do the New York statutes prevent the destruction of a contingent remainder by the natural termination of the preceding estate before the event occurs (note (a), § 606, *supra*), but they also provide that, "An expectant estate cannot be defeated or barred by any transfer or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise; but an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized. An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation." Real Prop. L. § 47, which was originally 1 R. S. 725, §§ 32, 33. The last part of this section, which declares that an expectant estate may be defeated as provided by the settler, not only enables him to have contingent remainders terminated as he may declare; but it also authorizes a conditional limitation to be made in the form of a fee to one person, with absolute power of use and disposal, and a valid gift to another of any portion of the property that the first taker may not use. The second attempted gift, in such an arrangement, no matter how it was sought to be made, would be utterly void at common law, because repugnant to the nature of the first estate. See *Van Horne v. Campbell*, 100 N. Y. 287; *Leggett v. Firth*, 132 N. Y. 7; *Swarthout v. Ranier*, 143 N. Y. 499; *Matter of Cager*, 111 N. Y. 343, 349; *Crozier v. Bray*, 120 N. Y. 366, 373; § 658, *infra*.

¹ 8 & 9 Vict. ch. 106, § 8; Digby, *Hist. Law R. P.* (5th ed.) p. 268.

² N. Y. L. 1896, ch. 547, §§ 47, 48; 1 Stim. Amer. Stat. L. §§ 1403, 1421, 1426.

³ 1 Fearn, *Cont. Rem.* pp. 364, 366, 367; Cruise, *Dig. tit. xvi. ch. viii.*

§§ 14–18, 22, 23; 1 Prest. Est. p. *89; *Roe d. Perry v. Jones*, 1 H. Blackst. 30; *Kenyon v. See*, 94 N. Y. 563, 568; *Roosa v. Harrington*, 171 N. Y. 341.

⁴ *Miller v. Emans*, 19 N. Y. 384, 390; *Upington v. Corrigan*, 151 N. Y. 148; *Bailey v. Hoppin*, 12 R. I. 560.

the doctrine of estoppel. Thus, they could be conveyed by fines and common recoveries, which resulted in estoppels of record; and, if deeded by deeds containing warranties, or recitals on which the purchasers justifiedly acted, the vendors were thereby estopped to claim the land against their vendees, if the events occurred in favor of the vesting of the remainders.¹ Such deeds did not *per se* transfer the contingent interests; but, if the remainders subsequently became vested, the warranties or recitals operated *by way of estoppel* against those who were treated as vendors in the deeds, and in favor of those who were treated as vendees.

Legislation, in England, New York, New Jersey, Massachusetts, Michigan, and several other states of this country, has made contingent remainders freely alienable, as well as devisable and descendible.² But these statutes must always be understood as meaning simply that such interests may be disposed of, when the uncertainty is as to the *event*, and not as to the *person*. A remainder to a person not *in esse* can not be transferred, because there is no one in being by whom it is owned.³ And it need hardly be added that, in its devolution or descent, any contingent interest must pass, still subject to the uncertainty. Thus, when land has been granted or devised to A for life, remainder to B and his heirs if C return from Rome, B, if an ascertained person, may now convey his remainder to D; and D will own it in fee simple, subject to the contingency of C's returning from Rome.⁴ (a)

(a) In New York, the statute declares that: "An expectant estate is descendible, devisable, and alienable, in the same manner as an estate in

¹ 1 Prest. Est. p. *89; Cruise, Dig. tit. xvi. ch. viii. §§ 20, 21; Stover v. Eycleshimer, 4 Abb. Ct. App. Dec. (N. Y.) 309; Nicoll v. N. Y. & E. R. Co., 12 N. Y. 121, 132; Robertson v. Wilson, 38 N. H. 48.

² 8 & 9 Vict. ch. 106, § 6; 3 & 4 Wm. IV. ch. 106, § 1; 1 Vict. ch. 26, § 3; N. Y. L. 1896, ch. 547, § 49; N. J. Gen. Stat. (1895) p. 881, § 138; 2 Wash. R. P. (6th ed.) pp. 554-557; Putnam v. Story, 132 Mass. 205; Whipple v. Fairchild, 139 Mass. 262, 263; Kenyon v. See, 94 N. Y. 563; Hennessy v. Patterson, 85 N. Y. 91; Ackerman's Adm'r v. Vreeland's Ex'rs, 14 N. J. Eq. 23; Godman v. Simmons, 113 Mo. 122.

³ 1 Prest. Est. p. *76; Putnam v.

Story, 132 Mass. 205. It has been held, however, in several cases in Massachusetts, including that last cited, and in one or two other states, that a person who would own the property, if the particular estate should terminate at once, may alien the contingent remainder, although a subsequent event might show him not to be the remainderman. Belcher v. Burnett, 126 Mass. 230; Wainwright v. Sawyer, 150 Mass. 168; Brown v. Fulkerson, 125 Mo. 400. See Haverstick's Appeal, 103 Pa. St. 394; Hilton v. Milburn's Ex'rs, 23 W. Va. 166.

⁴ Kenyon v. See, 94 N. Y. 563; Whipple v. Fairchild, 139 Mass. 262, 263.

§ 609. **Other Incidents of Contingent Remainders.** — A contingent remainder being alienable, it is now generally held that it can be reached by its owner's creditors for the payment of his debts.¹ So it may be passed by an assignment in bankruptcy or insolvency.² But in no proper sense can one be said to be seised of such an interest; and, therefore, there can be no dower nor curtesy in a remainder while it is contingent.³ It is now treated as an *estate* in most jurisdictions; but it is not such an estate as carries with it seisin or any of the rights or interests to which seisin is requisite.⁴

possession." Real Prop. L. § 49, which was originally 1 R. S. 725, § 35. This must be understood with the qualifications explained, — the owner must be in being and ascertained, and he who acquires the remainder takes it subject to the contingency. *Byrnes v. Stilwell*, 103 N. Y. 453, 461; *Kenyon v. See*, 94 N. Y. 563; *Hennessy v. Patterson*, 85 N. Y. 91; *Gomez v. Gomez*, 147 N. Y. 195; *Matter of Baer*, 147 N. Y. 348; *Roosa v. Harrington*, 171 N. Y. 341.

¹ This can be done in equity. *Daniels v. Eldredge*, 125 Mass. 356. But they can not be sold on execution. *Nichols v. Levy*, 5 Wall. (72 U. S.) 433; *Jackson v. Middleton*, 52 Barb. (N. Y.) 9.

² *Minot v. Tappan*, 122 Mass. 535; *Belcher v. Burnett*, 126 Mass. 230.

³ 1 Fearn, Cont. Rem. p. 346.

⁴ *Ibid.*; *House v. Jackson*, 50 N. Y. 161.

CHAPTER XXXV.

HOW REMAINDERS MAY BE MADE — SUCCESSIVE REMAINDERS — THEIR ACCELERATION.

§ 610. Creation of remainders. § 611. Contingent uses. § 612. Successive remainders. § 613. Effects of the contingency of a prior estate on a subsequent contingent remainder.	§ 614. Acceleration of vested remainders. § 615. Conclusion as to remainders.
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§ 610. **Creation of Remainders.** — Since the common law permits and favors remainders, an ordinary method of bringing them into existence, whether by deed, will, or other transaction, has always been by dealing directly with the *legal* estate in the property — by conveying that estate, for example, to A for life, and then to B and his heirs. But the same result may be, and sometimes is, produced by simply giving the equitable estate — the *use* — to the remainderman, and letting the Statute of Uses execute it when vested, thereby conferring upon him the legal estate.¹ Thus, if land be granted to X and his heirs, for the use of A for life, and then for the use of B and his heirs, B being an ascertained person *in esse*; the statute, by executing the use, at once gives the legal estate also to A for life, remainder to B in fee simple. This is an illustration of the rare but simple case of a vested remainder created by employing a use.

§ 611. **Contingent Uses.** — The most common employment of uses in connection with remainders has always been in the creation of those that were contingent. An illustration is a conveyance to X and his heirs, for the use of A for life, and then for the use of A's oldest son and his heirs, A having no son at the time. The Statute of Uses at once executes the use so far as A is concerned, and thus gives to him the legal es-

¹ And this was the usual method of creating remainders, especially contingent ones, at common law. Cruise, Dig. tit. xvi. ch. v. § 1; 4 Kent's Com. p. * 268.

tate for life; and, as soon as A's oldest son is in being, the use in fee is his, and then the Statute of Uses carries to him the legal estate in fee.¹ Such a remainder is called a contingent use. And, therefore, a contingent use may be tersely defined as a contingent remainder in a use.

Contingent uses, being merely contingent remainders created in this roundabout way, are governed by the same rules and principles as contingent remainders created in any other way. "Future or contingent uses are placed on exactly the same footing with contingent remainders."² It simply needs to be added that, in doubtful cases of future estates created by employing uses, the courts have always been more apt, than when they were otherwise made, to treat them as *executory*, and thus to sustain them, although they were not vested when the preceding estates terminated.³ But this is only a principle of construction for determining the *nature* of the future estate. And when it is once decided that a future interest is a contingent use—a contingent remainder in a use—it will be defeated at common law, the same as any other contingent remainder, by its failure to become vested at or before the termination of the precedent estate on which it depends for support.⁴

§ 612. **Successive Remainders.**—A number of remainders, one following the other successively, may be made as interests in one and the same piece of real property; and some of them may be contingent, followed by others that are vested, and these in turn by others that are contingent. Thus, land may be conveyed to A for life, remainder for life to B, a person not *in esse*, remainder for life to C, a living known person, remainder to D and the heirs of his body if he return from Rome, remainder to E and his heirs forever.⁵ Here there is first a life

¹ Goodtitle v. Billington, 2 Dougl. 753, 758; Adams v. Tenants of Savage, 2 Ld. Raym. 854; Sugd. Gilb. Uses, 153 n.; Cruise, Dig. tit. xvi. ch. iv. §§ 2, 18.

² Sugd. Gilb. Uses, 177 n.; Chudleigh's Case, 1 Rep. 119 b. 129; Leake, 356; Cruise, Dig. tit. xvi. ch. iv. §§ 10–17.

³ The *seisin* is vested in the trustee, or feoffee; and the courts have held in some cases that this alone was sufficient to support the future estates, even where they have called them remainders. See 1 Fearn, Cont. Rem. pp. 303, 304;

Cruise, Dig. tit. xvi. ch. iv. §§ 18, 19; Abbiss v. Burney, L. R. 17 Ch. Div. 211; Astley v. Micklethwait, L. R. 15 Ch. Div. 59.

⁴ Last preceding note but one.

The curious judicial search for *seisin*, because of some ways of creating contingent and future uses, and the resulting doctrine of *scintilla juris* are explained hereafter, in treating of shifting uses, § 623, *infra*.

⁵ Lewis v. Waters, 6 East, 336; Napper v. Sanders, Hut. 117; Cruise, Dig. tit. xvi. ch. i. §§ 44–50.

estate for A vested in possession, then a contingent remainder for B for his life, then a vested remainder for C for his life, then a contingent remainder in tail for D, and finally a vested remainder in fee simple for E. Subject to the rules and principles already explained, the only restriction on the stringing along of remainders in this way, some vested and some contingent or all of one kind, and whether made directly or by the employment of uses, is the obvious one that there can not be any valid remainder after a fee simple. (a) Such combinations of remainders have presented to the courts two questions or propositions, which are to be briefly discussed in order to complete our treatment of this form of future estates. These are, how may a succeeding remainder be affected by the contingency of a prior estate; and when will remainders be accelerated, and sooner become estates in possession, because of the failure of prior remainders?

§ 613. **Effects of the Contingency of a Prior Estate on a Subsequent Contingent Remainder.** — Will the failure or destruction of one estate in real property carry down with it succeeding remainders? The absolute answer, as to vested remainders, is no. These take effect in their order, when all the precedent estates have terminated.¹ And the answer is also no, as to a contingent remainder, unless the contingency of the prior estate is such as in reality to affect the remainder also. And whether or not it does reach to the remainder is a question as to the meaning and intent of the maker of the estates, to be gathered from the instrument (usually a will) and all the circumstances of the case.² And, further, the clear tendency of the courts, especially in recent times, is to hold that the failure of a precedent interest does not defeat any succeeding one, unless the intention of having it do so appears with reasonable certainty.³ Thus, on a devise being made, "to A for life, remainder to A's son in fee tail, and if such son refuse to take the testator's name, remainder to B and his heirs;" if A die without having any son, B will take the remainder in fee, un-

(a) It must be remembered that in New York there can not be more than two valid successive live estates. Real Prop. L. §§ 33-35; § 576, note (a), *supra*.

¹ Cruise, Dig. tit. xvi. ch. iv. § 17; § 614, *infra*.

² Amherst v. Lytton, 3 Bro. P. C. 486; Lenox v. Lenox, 10 Sim. 400;

Ranken v. Janes, 1 N. Y. App. Div. 272; 1 Fearn, Cont. Rem. p. 233 *et seq*.

³ Ibid.; Williams v. Jones, 166 N. Y. 522.

less the intent is expressed in some way more clearly than in the words quoted that the ultimate gift to B is to be dependent on A's having a son who shall refuse to take the testator's name.¹ There has been much subtle discussion about propositions such as these.² But the clear rule of to-day is that each successive remainder shall stand on its one base, and be defeated or abridged by no event except that on which it is *clearly intended* that it shall depend. And, in the absence of clearly expressed intent to the contrary, "where a devise is limited to take effect on a condition annexed to any precedent estate, if the precedent estate should never arise, the remainder over will nevertheless take place, the first estate being considered only as a precedent limitation, and not as a condition, to give effect to the subsequent limitation."³

§ 614. **Acceleration of Vested Remainders.**—By the destruction or failure to take effect of a contingent remainder or estate, a vested remainder which follows it may be "accelerated," or pushed forward so as to take effect that much sooner.⁴ Thus, if realty be granted to A for life, remainder to B for life if he marry C, remainder to D and his heirs; on the death of C before B marries her, D's remainder moves forward so that it is sure to vest in possession at the death of A.⁵ So, when land is devised by a husband to his widow for life, in lieu of dower, and she elects to take dower instead of the gift, a vested remainder devised after her life estate may be accelerated so as to take effect in possession at the testator's death.⁶ An intent clearly expressed by the grantor or testator may prevent such acceleration.⁷ But, otherwise, vested remainders are so advanced by the failure of preceding interests.

While a remainder is contingent, it can not be "accelerated," — can not be advanced by anything that occurs as to precedent

¹ This is essentially the case of *Scatterwood v. Edge*, 1 Salk. 229, 230.

² But the discussions frequently dealt with executory estates, as well as with remainders, and failed to draw any clear line of distinction between them. See 1 Fearn, *Cont. Rem.* pp. 233-247; 2 Jarman on Wills, (5th Amer. Ed.) 829; *Jones v. Westcomb*, 1 Eq. Abr. 245; *MacKinnon v. Sewell*, 5 Sim. 78, 2 Myl. & K. 202; *Napper v. Sanders*, Hut. 117; *Lethieullier v. Tracy*, 3 Atk. 774; *Scatterwood v. Edge*, 1 Salk. 229, 230 n.

³ *Williams v. Jones*, 166 N. Y. 522, 536.

⁴ *Goodright v. Cornish*, 1 Salk. 226; *Gott v. Cook*, 7 Paige Ch. (N. Y.) 521, 542; *Purdy v. Hayt*, 92 N. Y. 446; *Challis*, R. P. 94.

⁵ *Ibid.*

⁶ *Fox v. Rumery*, 68 Me. 121; *Parker Adm'r v. Ross*, 69 N. H. 213; *Timberlake v. Parish Ex'rs*, 5 Dana (Ky.), 345; *Jull v. Jacobs*, L. R. 3 Ch. Div. 703, 712.

⁷ *Blatchford v. Newberry*, 99 Ill. 11; *Benson v. Corbin*, 145 N. Y. 351.

estates. It must await the happening of the event or events specified in its creation.¹ And this is true even in such states as New York and Wisconsin, where statutes prevent contingent remainders from being defeated by their failure to vest before the termination or destruction of the particular estates. In those jurisdictions, if land be granted to A for life, remainder to a child not *in esse*, and A forfeit or refuse to take his interest, the land reverts to the grantor or his heirs until the child is in being, and then passes over to him by virtue of the statute.² (a)

§ 615. **Conclusion as to Remainders.** — The foregoing pages reveal the fact that remainders—those interests future but that may be presently owned, which “remain out,” to be enjoyed, if at all, after preceding estates have terminated—have given occasion for the closest and nicest reasoning of the best jurists of England and America. And the result, in both legal training and practical knowledge, will always repay the student for his labor in following their discussions to their logical conclusions. “The conception of a ‘remainder,’” says Digby,³ “is probably peculiar to English law, and is closely connected with the notions of estate and tenure. . . . Roman law did not admit of the simultaneous existence in different persons of separate rights of future and present enjoyment over the same subject-matter, except perhaps in the case of *dominium* and the so-called *jura in re aliena* (*ususfructus*, *emphyteusis*, etc.). Where these rights existed, the interest of the *dominus* was closely analogous to an English reversion. In French law, as it stood before the Code Napoleon, and in the systems derived from it (e. g., the law of Lower Canada), it is possible to create future interests by way of *substitution*. A thing may be given *inter vivos* or by will, to A, subject to a condition that he should, on the happening of a specified event, as, for instance, at his own

(a) It is to be noted that the New York statutes forbidding more than two successive life estates have the effect of accelerating any remainder in fee, which in terms is limited after more than that number of such life estates. Real Prop. L. §§ 33–35; § 576, note (a), *supra*; Purdy v. Hayt, 92 N. Y. 446; Woodruff v. Cook, 61 N. Y. 638; Dana v. Murray, 122 N. Y. 604, 618; Schettler v. Smith, 41 N. Y. 328; Campbell v. Beaumont, 91 N. Y. 464; Byrnes v. Stilwell, 103 N. Y. 453; Benson v. Corbin, 145 N. Y. 351.

¹ Goodright v. Cornish, 1 Salk. 226; Dale v. Bartley, 58 Ind. 101.

² Purdy v. Hayt, 92 N. Y. 446, 451.

³ Hist. Law R. P. (5th ed.) p. 270.

decease, hand it over to B. In this case a substitution is created in favor of B. A is regarded as the complete proprietor. . . . B, on the other hand, has no present right, he has merely the hope or expectation of becoming the proprietor of the thing if he survive A. . . . The doctrine of *substitutions* formed a large and important chapter in the early French law, but was wholly abolished by the Code Napoleon, Article 896."

It is a boon to modern lawyers, in some of our states, that many of the technical though logical principles of English remainders have also been abolished by statutes. (*a*)

(*a*) NEW YORK REMAINDERS. — The preceding notes have explained the special features of New York remainders as they have existed since 1830. These may be profitably summarized here as follows: —

1. Any future interest, made by act of the parties and dependent on a precedent estate, is called a remainder. And the distinction seems clearly settled that any remainder, no matter on how many conditions or events it may depend, is vested when there is a person in being who could immediately take the property if the precedent estates should terminate at once; and any other remainder is contingent. § 578, note (*a*), *supra*.

2. The law very strongly favors vested remainders. The rule in *Shelley's Case* being abrogated, this preference even makes a remainder vested when it is to the "heirs" of a living person to whom the precedent estate is given for life, — an estate to A for life, "remainder to his heirs," gives a vested remainder to those persons who would be his heirs if he were to die immediately. § 578, note (*a*), *supra*.

3. As to contingent remainders, two rules of the common law are retained, and five are abolished or modified. Those retained are, (1) that the event on which the remainder depends must be legal, and (2) that, while the contingency may be double or multiple, no remainder failing because of the improbability of the event on which it depends, yet the event must not be too remote — not as for future as to the child of an unborn person, § 603, note (*a*), *supra*. As to the other rules: (3) The contingency may be such as to defeat the particular estate (thus making valid what is in effect a conditional limitation), § 604, note (*a*), *supra*; (4) A freehold contingent remainder may be limited after a term of years, § 605, note (*a*), *supra*; (5) A remainder is not defeated by the fact that it is not vested when the particular estate naturally terminates, § 606, note (*a*), *supra*; (6) Nor is it defeated by any premature destruction of the particular estate, and thus is obviated the necessity for trustees to preserve contingent remainders, § 607, note (*a*), *supra*; (7) Not only is a contingent remainder descendible and devisable as at common law, but it is also freely alienable when its owner is in being and ascertained; and it passes to heirs, devisee, or alienee, subject to the contingency, § 608, note (*a*), *supra*.

4. Successive remainders to any number are allowed, subject to the obvious common-law principle that no remainder can exist after a fee simple, and to the statutory prohibition against more than two successive life estates; also subject to the rule against perpetuities to be hereafter ex-

plained. § 612, note (a), *supra*, and Ch. XL. *infra*. The failure of one remainder does not defeat any succeeding one, unless such is clearly the intent of their maker or settler. § 613, note (a), *supra*. Only vested remainders can be accelerated (as at common law); and especially the statute against more than two successive life estates frequently causes such remainders to be thus advanced.

(3) EXECUTORY ESTATES.

CHAPTER XXXVI.

KINDS OF EXECUTORY ESTATES — HOW CREATED.

§ 616. Demand for and forms of executory estates.		§ 617. Ways of making execu- tory estates.
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§ 616. **Demand for and Forms of Executory Estates.** — The future estates thus far considered depend on precedent, particular estates and await their *natural* termination. A reversion is made by the law, and rests for support on a particular estate. A remainder is made by the parties, and likewise rests for support on a particular estate. Dealing as they did with legal interests alone, the common-law courts originally refused to allow any other kind of future estate. The particular estate must be there *for support* — as an integral part of the continuous straight line of interest stretching away to infinity. To a Coke, the proposition that a freehold legal estate might begin in the future, without any preceding interest for its support, was like a suggestion to a builder that he should begin at the second story in constructing his house. Terms of years, after they arose, could be so dealt with, because they were mere affairs of contract which did not interfere with the seisin — nor with the continuous, infinite, straight line of interest. But a freehold estate must either be a present interest or be supported by a present interest.¹

As civilization advanced and property rights became more complicated, the demand grew stronger and stronger for other forms of future estates. Men wanted *four* kinds of expectant interests, which they could not make as remainders and the law would not treat as reversions. The *first* of these, as already shown, was a freehold estate to arise in the future, without any support, — as to a single man and his heirs, to begin when he marries. The *second* was a freehold estate so to

¹ Digby, Hist. Law R. P. (5th ed.) p. 332.

begin in the future as to *curtail* a precedent estate,—as to A and his heirs, but if B return from Rome, then to B and his heirs. Such an estate for B could not be a remainder, because it was not to rest on but *prematurely to end* A's estate. It is an estate on conditional limitation.¹ *Third*, out of a mere term of years, they desired to give to one person a freehold estate, and the residue of the term, if any, to another,—as out of a leasehold of one hundred years to grant a life estate to A, and after his death the residue to B. Such a gift to B could not be a remainder; in theory of law there could be nothing at all left for B, because A's estate, being freehold, must more than exhaust the entire term (however long), which was less than freehold.² And *fourth*, they wished to make an estate in form a freehold contingent remainder after an estate less than freehold,—as to A for ten years, residue in fee to a person not in being. It has been already explained that this could not be a remainder, since such an arrangement would cause a loss of seisin.³ These are the only things that have ever been attempted to be made as executory interests.⁴ To create any of them directly as legal interests was at common law impossible, because the judges stood firm upon their logic. And it was in the process of circumventing common-law judicial objections and resistance that the indirect methods of doing these four things—making the four species of executory interests—were invented and employed.

§ 617. **Ways of making Executory Estates.**—The Chancellor, in dealing with a use, was not bound by the technical rules which controlled the common-law courts. And, when it was sought in his forum to enforce a freehold estate in a mere *use* to arise unsupported in the future, or to take effect in derogation of a preceding use, the attempt was successful. And so one method by which it became possible to create executory estates, or at least the first three of the four forms of them above mentioned, was by dealing with the *use*. Thus, if property were conveyed to X and his heirs for the use of a single man and his heirs when he married, as soon as he married he would own the use in fee simple.⁵

¹ §§ 431–434, *supra*.

² *Lampet's Case*, 10 Rep. 46 b; *Wright ex dem. Plowden v. Cartwright*, 1 Burr. 282, 284; 2 Blackst. Com. p. *174.

³ § 605, *supra*.

⁴ Probably these four, together with remainders and reversions and the contract rights in chattels real, exhaust the possibilities of future limitations of property.

⁵ See § 618, *infra*.

The grantor or feoffor might personally dispose of such an executory use, or he might confer upon another person the authority or *power* to do so. Thus, he might enfeoff X of land for the use in fee of such person as A should appoint by his will; and at A's death the person accordingly designated by his will would own the use in fee. Thus, the executory use could be brought into being through the execution of a *power*.¹

After the enactment of the Statute of Wills, 32 Hen. VIII. ch. 1, as amended and explained by the later act of 34 & 35 Hen. VIII. ch. 5, it was decided, in view of the history of wills of realty, that it was intended by that legislation to allow executory estates to be directly made by devise, — as legal interests and without resort to uses. So made, they are “executory devises.” An obvious illustration is a devise of a tract of land (the legal estate being thus directly dealt with) to a single man and his heirs, to begin when he marries.²

Thus, exclusive of modern statutory methods, the three ways — and these are commonly the only ones — of creating an executory estate in real property are by uses, powers, and wills. A power is a means of disposing of a use; and so the second of these ways is in reality a subdivision of the first. But it can be most intelligibly discussed in a separate chapter. Therefore, of the next three chapters, which explain the nature and characteristics of executory estates, the first will deal with, *a*, springing uses and, *b*, shifting uses; the second with, *c*, powers; the third with, *d*, executory devises.

A clear understanding of these methods of creating executory estates is of great importance to the lawyer of to-day, because on this must be based any adequate appreciation of the statutory modes of doing the same thing, where these latter exist. And in quite a large number of the United States, it is now possible, by virtue of statutes, to make any of the four kinds of executory interests described in the preceding section, directly in the legal estate by either deed or will and without resort to uses. Some of those states are New York, (*a*) Vir-

(*a*) In New York, the statute enumerates and authorizes the four species of executory interests as follows: “Subject to the provisions of this article, a freehold estate as well as a chattel real may be created, to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel

¹ See § 624, *infra*.

² See pp. 97, 98, *supra*, and § 654, *infra*.

ginia, Michigan, Wisconsin, Indiana, Minnesota, and California.¹ And in two or three states, such as Maine, Vermont, and North Carolina, the same result has been produced by the courts without any direct legislative aid.²

real, either contingent or vested, may be created expectant on the determination of a term of years ; and a fee or other less estate may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article." Real Prop. L. § 40, originally 1 R. S. 724, § 24. "The provisions of this article" here meant are those which forbid too great futurity—the rule against perpetuities hereafter explained, and the requirement of § 34 of the same statute is that, when a remainder after a life estate is created in a term of years, it must be for the whole residue of such term—a life estate having been granted out of a term of 100 years, the remainder, if any, must take all the residue of the 100 years. See *Young v. Dake*, 5 N. Y. 463 ; *Mott v. Ackerman*, 92 N. Y. 539, 549 ; *Matter of Moore*, 152 N. Y. 602 ; *Losey v. Stanley*, 147 N. Y. 560.

¹ N. Y. L. 1896, ch. 547, §§ 34, 40–43 ; 1 Stim. Amer. Stat. L. §§ 1421–1426.

² *Abbott v. Holway*, 72 Me. 298 ; *Gorham v. Daniels*, 23 Vt. 600 ; *Savage v. Lee*, 90 N. C. 320.

CHAPTER XXXVII.

a. SPRINGING USES — *b.* SHIFTING USES.

- § 618. *a.* Springing uses.
- § 619. *b.* Shifting uses.
- § 620. Residue of term of years,
after precedent freehold estate.
- § 621. Freehold contingent estate,
after a term of years.

- § 622. Summary of springing and
shifting uses.
- § 623. Seisin to support shifting
or contingent uses — *Scintilla juris*.

§ 618. *a.* **Springing Uses.** — A springing use is an estate, created by use, to begin in the future, without any precedent estate for its support. Such an interest is brought into being when a conveyance is made to X and his heirs, for the use of B, a single man, to begin when he marries; or for the use of A for life, and one day after A's death for the use of B and his heirs. In each of these cases, the use for B is a springing one; in the first, because there is no use placed before it, and in the second because the one day that is to intervene between the two estates prevents B's from resting on A's for support. Such estates were frequently made before the enactment of the Statute of Uses; the legal title then remained continuously in X, the feoffee to uses, and after the designated event occurred, B, the *cestui que use*, enjoyed the use.¹ After the Statute of Uses was passed, it was held, of course, that as soon as the use came to B it was executed by that statute, i. e., the legal estate was immediately taken from X to him, "*in the same quality, manner, form, and condition*" in which he obtained the use.² Thus, the legal estate was *indirectly* made to spring up for him in the future. If, then, a deed had been made of the legal estate directly to B, a single man, to begin when he married, it would have been a nullity; but, made to a *present taker* of the legal estate, for the use of B, to begin when he married, it was valid; and when B

¹ Digby, Hist. Law R. P. (5th ed.) pp. 332, 333.

² See the operation of the statute explained, § 302, *supra*; Mutton's Case,

3 Dyer, 274 b; Egerton v. Earl Brownlow, 4 H. L. Cas. 1, 206; 2 Crabb, R. P. §§ 1689-1692; Wms. R. P. p. * 290.

married he acquired the use, and then instantly by the statute the legal estate—he obtained indirectly a future legal estate which could not be deeded to him directly. The taker and holder of the legal estate for his use may be a third party, as X in the illustrations given; or by covenant the settler may constitute himself such holder. In either case, the use (and with it, by the statute, the legal title) reverts or results to the settler until the event happens which causes the use to spring upon the other party—B in the illustrations.¹ That event may be designated either as a contingency or as something that is sure to occur.²

§ 619. *b. Shifting Uses.*—A shifting use is a conditional limitation in a use.³ It arises, for example, from a conveyance to X and his heirs, for the use of A and his heirs, but if B return from Rome then for the use of B and his heirs; or, for the use of A for life, but if he cease to live on the land, then immediately for the use of B. B's use does not rest on A's for support; but, if B ever take it, it will be by the *premature destruction* of A's interest,—the use will *shift* from A to B.⁴ It has been heretofore explained that at common law an estate on conditional limitation of the *legal* interest could not be *directly* made.⁵ The shifting use supplied the method by which it could be *indirectly* made. A deed of the legal estate to A and his heirs, but if B returned from Rome then to B and his heirs, was a nullity as to the attempted estate for B,—the grantor could not thus curtail his own first grant, and A took the entire interest in fee simple. But if the transfer were to X, *a present feoffee to uses*, for the *use* of A and his heirs, but if B returned from Rome then for the *use* of B and his heirs, the entire arrangement was valid; and, after the enactment of the Statute of Uses, if B returned, the use in fee was his, and

¹ Ormond's Case, Hob. 348 b.; Jackson ex dem. Trowbridge v. Dunsbagh, 1 Johns. Cas. (N. Y.) 92, 96; Town of Shapleigh v. Pillsbury, 1 Me. 271; Cruise, Dig. tit. xvi. ch. v. §§ 20-25.

² Ibid.; Weale v. Lower, Pol. 54, 65; Cornish, Uses, 91.

³ See discussion of estates on conditional limitation, §§ 431, 434, *supra*. These uses are also sometimes called secondary uses. Hatfield v. Sneden, 54 N. Y. 280; 2 Wash. R. P. (6th ed.) § 1633.

⁴ Egerton v. Brownlow, 4 H. L. Cas. 206, 209; Packard v. Ames, 16 Gray (Mass.), 327, 328; Wms. R. P. p. * 291; Cruise, Dig. tit. xvi. ch. v. §§ 26-36. The possibility of thus making one freehold estate to take effect in derogation of another by means of a use otherwise than by devise, has been denied in Illinois. See Strain v. Sweeny, 163 Ill. 603, and cases cited.

⁵ § 433, *supra*.

then instantly the statute shifted to him the legal estate in fee. Thus, *indirectly*, by employing a use, this shifting future estate — this conditional limitation made by way of use — may be brought into being, although at common law it could not be made by dealing *directly* and only with the legal estate.¹

§ 620. **Residue of Term of Years after Precedent Freehold Estate.** — The least of the freeholds (a life estate) being in contemplation of law greater than any estate for years, no matter how long, it necessarily followed at common law that, if the owner of a mere term, however great, — say for 1,000 years, — transferred his interest to A for life, and attempted to give the residue to B as a remainder, A took the entire estate and B got nothing.² But, says Cruise, “although a lessee can not limit his term by way of remainder, in the proper sense of that word, yet by assigning it to a trustee upon trusts . . . interests in the nature of remainders may be created by deed or will.”³ That is, the owner of a term of 1,000 years (or any other duration) may assign it to X, in trust for, or for the use of, A for life, and then during the rest of the term for B. A then has the use or benefit of the property while he lives; and, after his death, such benefit or use passes to B for the rest of the term. Thus there may be a species of shifting use in a chattel real.⁴ But such uses are not executed by the Statute of Uses, because the holder of the legal estate (X) has only a chattel real, and therefore is not *seised*. He continues to hold the land *in trust* for the beneficiaries. B, the so-called remainderman, to whom the trust interest may shift, obtains no legal estate; but simply has the right to compel the proper holding of the chattel real in trust. Therefore, this form of estate is simply to be noted here as one in which the *use* may shift, but not the legal estate, when the arrangement is not made by will. It will be shown hereafter that, by a *will*, the *legal estate* may be made to shift, in such a case as this, to B, and that this is one of the forms of executory devises.⁵

§ 621. **Freehold Contingent Estate after a Term of Years.** — It

¹ Last three preceding notes; Digby, Hist. Law R. P. (5th ed.) pp. 332, 333, 357, 358. This form of executory estate has been much employed in making marriage settlements. See 2 Wash. R. P. (6th ed.) § 1636.

² Manning's Case, 8 Rep. 94 b, 95; 4 Kent's Com. p. * 269.

³ Cruise, Dig. tit. viii. ch. ii. § 20.

⁴ Lampet's Case, 10 Rep. 46 b; Wright v. Cartwright, 1 Burr. 282; Oakes v. Chalfont, Pol. 38; 2 Fearn, Cont. Rem. (Smith's ed.) § 159 a.

⁵ Ibid.; 4 Kent's Com. p. * 270; § 654, *infra*.

has been shown that the common-law courts would not permit a freehold contingent remainder to be limited on an estate for years, because thereby the seisin would be lost.¹ Could this be done by a use, as in effect a form of springing use? If land were conveyed by deed to X and his heirs, for the use of A for ten years, and then for the use of B, a person not *in esse*, and his heirs, could B's estate be sustained as a springing use, although in form a *contingent use* (a contingent remainder in a use) after A's estate for years? It was said in Chudleigh's Case,² and squarely decided in *Adams v. Savage*³ and *Rawley v. Holland*⁴ that it could not. For those cases followed the rule that, if a future estate can be construed as a remainder, this must be done; and it can not be sustained as a springing or shifting use.⁵ Those decisions have met with able, adverse criticism.⁶ But they have not been overruled. And it probably can not be said that the common-law courts, unaided by legislation, have allowed an estate in the form of a freehold contingent remainder, after an estate for years, to be made by any conveyance or instrument except a will. It may be directly made by will, as one of the forms of executory devises.

§ 622. **Summary of Springing and Shifting Uses.** — The above discussion shows that, of the four forms of executory estates which men wanted, they could make two by uses in such manner that the legal estate would be carried by the Statute of Uses to him who acquired the use, namely: by a springing use they could make a freehold estate to arise in the future without any support; and by a shifting use they could make an estate on conditional limitation. They could give the *use* of the residue of a term of years, as in form a remainder after a precedent freehold *use* in the same term; but by uses alone,

¹ § 605, *supra*.

² 1 Rep. 119 b, 121.

³ 2 Salk. 679 (A. D. 1703).

⁴ 2 Eq. Cas. Abr. 753 (A. D. 1712).

⁵ Also *Goodtitle v. Billington*, 2 Doug. 753; *Carwardine v. Carwardine*, 1 Eden, 27, 34; *Sugd. Gilb. Uses*, 167, 176.

⁶ *Wilson, Uses*, 69, 70; *Sugd. Gilb. Uses*, 167, 168, note; 1 *Sand. Uses* (5th ed.), 147 *et seq.* The argument against them is that, since such a future estate can not be a remainder, when thus made

by use it should not be construed as an attempted remainder and so destroyed; but, having only an estate for years ahead of it, the future use should be treated as if there were no estate ahead of it and so sustained as a springing use. "To construe a limitation as a remainder, if it can be a remainder," says Professor Gray, "is one thing; but to insist on construing it as a remainder when it cannot be a remainder, seems the very wantonness of destruction." Gray, *Perpetuities*, § 59.

without resort to a will, they could not thus manipulate the legal estate. And, finally, the fourth thing that they desired to do — to make an estate in form a freehold contingent remainder after an estate less than freehold — they could not do by uses, except by also employing wills.¹(a)

§ 623. **Seisin to support Shifting or Contingent Uses — Scintilla Juris.** — When a use shifts from A to B, or arises in favor of B on the happening of a contingency, the Statute of Uses takes to him the legal estate also, provided there is some one *seised* for his use. But, inquired the early lawyers, who is seised for the use of one who obtains a shifting or contingent use, after the seisin has been taken from a feoffee and passed to the first *cestui que use*? If land be conveyed “to X for the use of A and his heirs, but if B return from Rome then for the use of B and his heirs,” the Statute of Uses at once takes all the legal estate and with it the *seisin* from X, and passes them to A; then if B return, who is seised for his use? Drawn probably from thoughts of the *calculus* of mathematicians, the theory was long maintained that in such a case, after the legal estate had passed to A, an infinitesimal piece of seisin, solemnly named *scintilla juris*, remained in X.² But this “invention to get rid of an assumption,” as it has been

(a) In New York, as already explained (§ 620, note (a), *supra*), not only has it been possible since 1830, to do all of these things by dealing directly with the legal title by either deed or will; but the object and result of the revision of that date was to do away with their creation by means of uses. The statutes declare that: “Every estate which is now” (Jan. 1, 1830) “held as a use, executed under any former statute of the state, is confirmed as a legal estate.” “Uses and trusts concerning real property, except as authorized and modified by this article, have been abolished; every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter.” Real Prop. L. §§ 70, 71, originally 1 R. S. 727, §§ 45, 46. See note (a), § 331, and pp. 493, 494, *supra*; 4 Kent’s Com. p. *245, note (a).

¹ The modern statutory modifications of these results is to be here again called to mind. § 617, *supra*.

² Chudleigh’s Case, 1 Rep. 119 b, 120; Wigg v. Villers, 2 Rolle, Abr. 796; Sugd. Gilb. Uses, 296, note. The difficulties engendered by this curious search for seisin have filled a large space in legal literature. Some judges said the seisin was *in nubibus* (in the clouds, ready to descend when needed);

others located it in the “bosom of the law,” and still others declared that it was in a state of suspended animation, — an infinitesimal piece of seisin in a state of suspended animation. “It is impossible,” says Mr. Digby, “even to state these difficulties in language intelligible to us, so completely has the mode of thought which gave rise to them passed away.” Digby Hist. Law R. P. (5th ed.) p. 371.

well styled,¹ has been put aside in favor of the more common-sense view that the legal estate and seisin pass to each holder, subject to all the uses that are to follow,—so that, in the illustration given, when A becomes seised of the legal estate, *he* is seised as X was for the use of B, if B return from Rome,—each one in turn, as the freehold legal estate comes to him, is *seised* for the use of the next one in the series in whom a use may become vested according to the original formation of the estates.²

¹ Hayes, Real Est. 166.

² Ibid.; Wms. R. P. p. *273; 4 Kent's Com. pp. *243, *244. In England the doctrine of *scintilla juris* was

abolished by statute, 23 & 24 Vict. ch. 38, § 7, as to which see Digby, Hist. Law R. P. (5th ed.) p. 371, note.

CHAPTER XXXVIII.

c. POWERS.

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§ 624. **Powers defined and explained.** — Chancellor Kent defines a power as “a mere right to limit a use,”¹ i. e., a mere right to dispose of a use, or to determine how and to whom it shall go. Finding that they could not make in the legal estate the four kinds of executory interests which they wanted, owners of land not only resorted to springing and shifting uses as heretofore explained, but long before the enactment of the Statute of Uses they resorted to the system of authorizing others to dispose of the uses in these peculiar ways. Thus, the owner of land would convey it to X and his heirs, for the use of such person or persons as A might subsequently designate; and when, by virtue of this *power*, A appointed the beneficiaries, X held the land for their use, and they became the owners of a use thus made to *spring* up in their favor. So, if the land were conveyed to X and his heirs, for the use of A and his heirs until B designated other beneficiaries, when B appointed such others, the use would *shift* to them. Hence, Mr. Sugden says of powers: “In truth they were future uses to be designated by the person to whom the power was given: these, when they arose, equity compelled the trustee” (the holder of the legal title — X, in the illustration) “to observe.”² And Mr. Digby adds: “The only difference between an interest thus created and an immediate conveyance being that, instead of the uses being declared by the original settler at the time of the conveyance of the legal estate, it is left to a third person to declare them.”³

The execution of powers could thus fix the destination of any kind of future use, whether in the form of a remainder or an executory interest; but probably their most ordinary employment at common law was in making what were, in effect when made, contingent, springing, and shifting uses.⁴ These powers, — these rights to dispose of uses, — which are the subject of this chapter, must be carefully distinguished at the outset from the familiar common-law authorities, such as a power of attorney to execute a deed, to make a contract, or to

¹ 4 Kent's Com. p. *316.

² Sugd. Pow. p. 11.

³ Digby, Hist. Law R. P. (5th ed.)

p. 362.

⁴ Ibid.

manage a business.¹ In the absence of statutory modification, the common-law real property power deals with nothing but a *use*.

In several states of this country, such as New York, Michigan, Minnesota, and Wisconsin, the law of powers has been separately codified.² These statutes, however, while purporting to abolish powers as they formerly existed, have proved not to be wholly exhaustive; and they frequently need the light of the common law. The modifications produced by them will be explained as the discussion advances. And here it is to be noted that they make powers deal with the *legal* estate instead of the *use*. Therefore, a New York or Michigan power may now be tersely defined as a right to dispose of a *legal estate*.³ (a)

§ 625. **Definitions of Terms employed in Connection with Powers.** — The person who creates a power is called the *donor*; he upon whom it is conferred, the *donee*; the act of executing it, or doing what it authorizes in disposing of the use or estate, is an *appointment*; and it follows that in executing it the donee becomes the *appointor*, while he who obtains the use or estate by virtue of the appointment is the *appointee*.⁴ (b)

(a) The New York codification begins with the declaration that: "Powers, as they existed by law on the thirty-first day of December, eighteen hundred and twenty-nine, have been abolished. Hereafter the creation, construction, and execution of powers, affecting real property, shall be subject to the provisions of this article; but this article does not extend to a simple power of attorney, to convey real property in the name, and for the benefit of the owner." And then it adds, as a definition, "A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform." Real Prop. L. §§ 110, 111, originally 1 R. S. 732, §§ 73, 74, 1 R. S. 738, § 134. But, in order to explain the code thus introduced, the courts have frequently had recourse to common-law decisions and writers. See *Downing v. Marshall*, 23 N. Y. 366, 379; *Townshend v. Frommer*, 125 N. Y. 446, 465; *Sweeney v. Warren*, 127 N. Y. 426, 433; *Dyett v. Central Trust Co.*, 140 N. Y. 54; *Towler v. Towler*, 142 N. Y. 371, 375; *Tilden v. Green*, 130 N. Y. 29; Real Prop. L. § 1.

(b) All these terms are thus employed in New York, except the first two, which are changed as follows: "The word 'grantor' is used in this article, in connection with a power, as designating the person by whom

¹ 4 Kent's Com. p. *315; *Weber v. Bridgman*, 113 N. Y. 600.

³ 1 Stim. Amer. Stat. L. § 1651.

² N. Y. L. 1896, ch. 547, §§ 110-162;

⁴ *Whitlock v. Washburn*, 62 Hun (N. Y.), 369, 371.

1 Stim. Amer. Stat. L. §§ 1651-1659.

§ 626. **Effects of the Statute of Uses on Powers.** — Before the Statute of Uses was enacted, powers were freely employed for the disposal of executory and contingent uses. That statute simply added the means of taking the legal title along with the use. And thus powers became one of the most common methods of utilizing the statute.¹ An owner of land, for example, conveys it to X and his heirs, for the use of A for life, with power in A to appoint the subsequent uses. The Statute of Uses at once gives to A a legal life estate; and as donee of the power he may make subsequent estates arise pretty much as he may choose. If he appoint the residue of the use in fee to his youngest son (not yet in being), he makes a contingent use; if he appoint it to B, to take effect one day after A's death, he makes a springing use; and if he appoint it to B and his heirs, but if C return from Rome, then to C and his heirs, he makes a shifting use; and, in either case, the instant the use vests in the appointee the statute supplies him with the legal estate "*in the same quality, manner, form, and condition*" in which he takes the use.²

§ 627. **Powers Collateral, in Gross, Appendant.** — The chief common-law division of powers is into collateral powers and those not collateral, with a subdivision of the latter into powers in gross and powers appendant; thus making three prominent classes, namely: *collateral, in gross, and appendant*.³ A collateral power is one owned by a person who has no estate in the property; as where land is conveyed to X and his heirs for the use of A for life, with power in B to appoint the residue of the use. That is, the power is conferred upon a stranger to the title. And the practical, distinctive feature of such a power is that the donee can not destroy it "because it is no more than a bare nomination;" he can *execute* it as authorized, but can not ordinarily get rid of it in any other way.⁴ A power in

the power is created, whether by grant or by devise; and the word 'grantee' is so used as designating the person in whom the power is vested, whether by grant, devise, or reservation." Real Prop. L. § 112, originally 1 R. S. 738, § 135. This change in nomenclature was uncalled for, and has probably done more harm than good. See Chaplin on Express Trusts & Powers, § 538.

¹ Sugd. Pow. 11; Digby, Hist. Law R. P. (5th ed.) p. 362.

² Wms. R. P. p. *295; Collins v. Wickwire, 162 Mass. 143.

³ Edwards v. Sleater, Hardr. 410, 415, — *Per* Hale, Ch. B.

⁴ Ibid.; Bergen v. Bennett, 1 Cai. Cas. (N. Y.) 1, 15; Gilman v. Bell, 99

gross is one owned by a person who has also an estate in the property; but the execution of the power will not affect such estate; as where land is conveyed to X and his heirs for the use of A for life, with power in A to appoint the residue of the use. Here A has a power that is not collateral; it is coupled with his own life interest in the land, but its execution will have no effect on that life interest.¹ A power is appendant when its owner has also an interest in the property, which will be affected by the execution of the power; as where land is conveyed to X and his heirs for the use of A for life, with power in A to make leases of the use, say for twenty-one years, to commence when made—"commence in possession." The execution of this power interferes with A's interest by passing the land over to the lessee.² Before execution, either a power in gross or one that is appendant—and most readily the latter form—may be destroyed wholly or partially by its owner.³

§ 628. **Importance of Powers Appendant to make Leases.**—Powers appendant to make leases have always been of great advantage and utility to life tenants. For a lease made by such an owner, who has no appended power, will terminate at his death; and is therefore precarious and difficult to make to advantage. But if by virtue of an added power he can make the lease, so that it will continue during the period specified though he may die in the meantime, he may obtain a better tenant and generally lease to more advantage.⁴

Because a lease so made may continue after the reversion has passed to a succeeding owner, and so its existence may deprive him of possession for a time, this kind of power is usually given with careful restrictions as to how it shall be executed. The most common and important of these are that the lease shall not be for more than twenty-one years (three lives), and shall commence as soon as made (in possession), that the best rent reasonably obtainable shall be reserved, and that only

Ill. 144; *In re D'Angibau*, L. R. 15 Ch. Div. 228.

¹ Sugd. Pow. 114; Leake, 387; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 236; *Smith v. Somes* (1896), 1 Ch. 250.

² The donee of the power leases the use; and the Statute of Uses takes the legal estate in the term to the lessee. *Hardres*, 410, 415; *Bergen v. Bennett*, 1 Cal. Cas. (N. Y.) 1, 15. These are also

called sometimes powers appurtenant. 4 Kent's Com. pp. *316, *317.

³ *Albany's Case*, 1 Rep. 107 a; *Edwards v. Sleater*, Hardr. 410, 415, 416; *Smith v. Somes* (1896), 1 Ch. 250; *Chance, Pow.* § 3127 *et seq.*

⁴ *Maundrell v. Maundrell*, 10 Ves. Jr. 246 b; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 236; *Cruise, Dig. tit. xxxii. ch. xv.*

such lands shall be so dealt with as have been customarily let.¹ In those states in which powers are codified, as New York, Michigan, and Wisconsin, this matter is partially regulated by statutes, which also enable the life owner thus to lease the legal estate directly.² (a)

§ 629. **Powers General and Special, Beneficial and in Trust.** — With less stress laid on the classes produced, the common law also divided powers into general and special (or particular), and again into beneficial and in trust. When the donee may appoint as great an estate as he pleases (up to a fee simple) to any one whom he may choose, the power is *general*; when he is restricted as to either the quantity of estate which, or the persons to whom, he may appoint, it is *special*.³ When the donee may appoint the property to himself if he choose, it is *beneficial*; when he can not do this, but must execute it, if at all, for the benefit of some person or persons other than himself, it is *in trust*.⁴ Combining these, as the statutes have done in states like New York where powers are codified, the four classes of powers that emerge are: general-beneficial; general-in-trust; special-beneficial; special-in-trust. This arrangement of powers can be best understood from the statutory definitions, such as those of New York, which are quoted in the note below. (b)

(a) The New York statute, dealing with the legal estate, provides that "A special and limited power may be granted, . . . to a tenant for life, of the real property embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life; and such a power is valid to authorize a lease for that period, but is void as to the excess." Real Prop. L. § 123, subd. 2, originally (all but the last clause) 1 R. S. 733, § 87, subd. 2. See also Real Prop. L. §§ 135, 136; 1 R. S. 737, § 130; *Bergen v. Bennett*, 1 Cal. Cas. 1, 15; *Wilson v. Troup*, 2 Cow. 195, 236.

(b) The New York code classifies powers as follows: Real Prop. L. "§ 113. — A power, as authorized in this article, is either general or special, and either beneficial or in trust.

"§ 114. — A power is general, where it authorizes the transfer or en-

¹ See these and other favorite restrictions explained in detail in Cruise, Dig. tit. xxxii. ch. xv. See also 2 Blackst. Com. pp. *317, *323. If the life owner attempt to lease for a longer period this thus permitted, the lease is void only as to the time in excess of that which is authorized. *Campbell v. Leach*, Ambler, 740.

² N. Y. L. 1896, ch. 547, §§ 123, 135, 136; 1 Stim. Amer. Stat. L. § 1652.

³ Co. Lit. 271 b; Wms. R. P. pp. *304 — *310.

⁴ 4 Kent's Com. pp. *317 — *319; 1 Perry on Trusts, §§ 248-252; § 332, *supra*.

Powers in trust were dealt with above, in the chapter on express trusts; and it was there explained that the radical difference of a fee, by either a conveyance or a will of or a charge on the property embraced in the power, to any grantee whatever.

“§ 115. — A power is special where either :

“1. The persons or class of persons to whom the disposition of the property under the power is to be made are designated : or,

“2. The power authorizes the transfer or encumbrance, by a conveyance, will, or charge, of any estate less than a fee.

“§ 116. — A general or special power is beneficial, where no person, other than the grantee, has, by the term of its creation, any interest in its execution. A beneficial power, general or special, other than one of those specified and defined in this article, is void.

“§ 117. — A general power is in trust, where any person or class of persons, other than the grantee of the power, is designated as entitled to the proceeds, or any portion of the proceeds, or other benefits to result from its execution.

“§ 118. — A special power is in trust, where either,

“1. The disposition or charge which it authorizes is limited to be made to a person or class of persons, other than the grantee of the power; or,

“2. A person or class of persons, other than the grantee, is designated as entitled to any benefit, from the disposition or charge authorized by the power.

“§ 123. A special beneficial power may be granted; 1. To a married woman, to dispose, during the marriage, and without the concurrence of her husband, of any estate less than a fee, belonging to her, in the property to which the power relates; or,

“2. To a tenant for life, of the real property embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life; and such a power is valid to authorize a lease for that period but is void as to the excess.”

These sections, in substance, were originally 1 R. S. 732, §§ 76-79; 733, §§ 87, 92, and 734, §§ 94, 95. An illustration of each of the four resulting forms of powers may here be useful. 1. *General-beneficial*. — A grant or devise to A for life, with power to B to appoint the residue in fee simple to any one whom he may select. *Hume v. Randall*, 141 N. Y. 499; *Matter of Moehring*, 154 N. Y. 423; *Roberts v. Lewis*, 153 U. S. 367. 2. *General-in-trust*. — To A for life, with power to B to sell the residue in fee simple to any one and distribute the proceeds among the children of C. This is a peculiar form. B's power of disposing of the realty is general; and the trust element consists in the fact that he must dispose of the proceeds for others. *Russell v. Russell*, 36 N. Y. 581; *Garvey v. McDevitt*, 72 N. Y. 556, 563; *Delaney v. McCormack*, 88 N. Y. 174; *Dana v. Murray*, 122 N. Y. 604. 3. *Special-beneficial*. — To A, a married woman, with power to her to make leases of the land or dispose of it for life without the consent of her husband; or to B for life, with power to make leases to last for twenty-one years. The first subdivision of § 123 is not so important as it was before a married woman was enabled to dispose freely of her property; and it has been held that it does not prohibit the giving to her of a beneficial power to dispose of any interest not vested in her. *Cutting v. Cutting*,

ence between a trust and a power in trust is that a trustee always has the legal estate, while the donee, as such, of a power in trust does not.¹ A power is merely a right to dispose of a use, or of the legal estate by virtue of statute; but it does not confer on the donee, as such, any estate.

Creation of Powers.

§ 630. **How created generally.** — No technical expressions nor words of art are necessary in the creation of powers. They may be made by deed or will, by direct grant or reservation, by recital or covenant; and it is sufficient that the intention is clearly expressed.² They may arise by implication, as often occurs, for example, from the nature of duties imposed by wills on trustees or executors.³ Thus, if a will simply direct that the testator's real property shall be sold or otherwise disposed of, and the proceeds distributed by the executors, they are impliedly given a power to carry out the instructions as to the realty.⁴ And when land is devised to A for life, remainder in fee to B of any of it that may be undisposed of by A, there is an implied power in A to dispose of the entire property for his own benefit.⁵

A power may be created by any person capable of transferring an estate in the property to be affected by the power. And it may be created by will; or granted or reserved by any instrument operating *inter vivos*, which is sufficient to pass an estate in the property to be affected.⁶ (a)

86 N. Y. 522, 533; *Jackson v. Edwards*, 7 Paige, 386, 22 Wend. 498; *Bergen v. Bennett*, 1 Cal. Cas. 1, 15. 4. *Special-in-trust.* — To A for life, with power to B to divide the residue among the children of C, or to appoint the residue for life to any one of A's children. The class of persons, or the estate, or both are restricted; and the grantee (B) can not be benefited by his execution of the power. *Smith v. Bowen*, 35 N. Y. 83, 89; *Garvey v. McDevitt*, 72 N. Y. 556, 563.

(a) The New York statutes express these principles as follows: "A person is not capable of granting a power, who is not, at the same time,

¹ § 332, *supra*.

² 4 Kent's Com. p. *319; Sugd. Pow. 102, 104.

³ *Cahill v. Russell*, 140 N. Y. 402; *Matter of Gantert*, 136 N. Y. 106.

⁴ *Ibid.*; *Roberts v. Lewis*, 153 U. S. 367; *Paine v. Barnes*, 100 Mass. 470.

⁵ *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Hale v. Hale*, 137 Mass. 168; *Wood v. Hammond*, 16 R. I. 98;

Sugd. Pow. 115. "The creation, execution, and destruction of powers, all depend on the substantial intention of the parties; and they are construed equitably and liberally in furtherance of that intention." 4 Kent's Com. p. *319.

⁶ *Selden v. Vermilya*, 3 N. Y. 525, 536; *Farwell*, Pow. p. 6; 4 Kent's Com. p. *319.

The two most important matters associated with the creation of powers have arisen, the one from testamentary directions to executors to dispose of real property, and the other from the conferring of absolute authority on life owners to dispose of the residue of the estate in fee. Each of these calls for a separate discussion.

§ 631. **Power in Executors to dispose of Real Property.** — In their efforts to ascertain testators' intent, the courts have sometimes had much difficulty in deciding whether executors were made trustees, or were merely given powers, by the various expressions used in wills to authorize them to dispose of real property. Typical forms of such expressions are, "that my executors shall sell;" "I devise my land to my executors to sell;" "I direct that my land shall be sold," or "shall be sold by my executors," etc. It was quite early settled that only the second of the forms quoted, or its equivalent, i. e., "a devise of land to executors," makes them trustees; and, where this is not clearly the import of the language of the will, a power simply is created.¹

But, while this common-law test is very plain in theory, it is often difficult to apply in construing the peculiar language of wills. Because of such difficulty, and in conformity to their general scheme of making, when possible, all authorities to deal with realty powers rather than trusts,² the revisers of New York (1830) made the simple test whether executors who are empowered to sell or mortgage real property are also expressly or impliedly authorized to receive the rents and profits until the mortgage or sale is made. If so, they take the property in trust. Otherwise, they have only a power. (a)

capable of transferring an interest in the property to which the power relates." "A power may be granted either: 1. By a suitable clause, contained in an instrument sufficient to pass an estate in the real property, to which the power relates; or, 2. By a devise contained in a will. The grantor in a conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and a power thus reserved, shall be subject to the provisions of this article, in the same manner as if granted to another." Real Prop. L. §§ 119, 120, 124, originally 1 R. S. 732, § 75, and 735, §§ 105, 106.

(a) The statute declares that, "A devise of real property to an executor or other trustee, for the purpose of sale or mortgage, where the trustee

¹ Co. Lit. 113 a, 181 b; 1 Sugd. Pow. p. 129; *Yates v. Compton*, 2 P. Wms. 308; *Moncrief v. Ross*, 50 N. Y. 431, 435.

² See note, pp. 494, 495, *supra*.

§ 632. **General, Beneficial Power in a Life Tenant to appoint the Fee Simple.** — When one has a life estate in real property, and also a general power to dispose of the residue in fee, he may so readily become the absolute owner by executing the power in favor of himself that the question early arose, is he not to be treated as the owner in fee simple as soon as such interest and power become his? The answer was, No, unless the testator evinces a wish that he shall own a fee, — a power is thus created, that remains distinct from his estate.¹ But in such cases the curious result has been worked out in equity that, as soon as he executes his power and appoints the fee, whether the appointment is to himself or to another person, he is to be regarded as the absolute owner of the fee so far as his creditors are concerned. Thus, if land be conveyed to X and his heirs, for the use of A for life, with power in A to appoint the residue of the use in fee to any one; so long as A has not executed his power, his creditors can not reach any interest in the land except his life estate; but if he execute the power, even though in doing so he attempt to give the remainder to B, then in equity A's creditors may reach the entire fee simple for the payment of his debts to them.² The principle is that, if he execute the power at all, *he ought to do so in favor of his creditors*; and, regarding that as done which ought to be done, equity treats his appointment as making the fee available for them.

This result is an anomaly in the common law; as is also the further technical distinction that *by deed*, but not *by will*, a general power of appointment may be made to coexist (without extinguishment) even with an absolute fee in the donee of the power.³ Therefore, in such states as New York, Michigan, Minnesota, and Wisconsin, where the law of powers is codi-

is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power." Real Prop. L. § 77, originally 1 R. S. 729, § 56. See *Konvalinka v. Schlegel*, 104 N. Y. 125; *Chamberlain v. Taylor*, 105 N. Y. 185; *Hubbard v. Housley*, 43 App. Div. 129; pp. 494, 495, *supra*.

¹ *Bradly v. Westcott*, 13 Ves. 445, 453; *Liefe v. Saltingstone*, 1 Mod. 189; 1 Sugd. Pow. pp. 120-124; 4 Kent's Com. p. * 319.

² *Ibid.*; *Clapp v. Ingraham*, 126 Mass. 200. See *Collins v. Wickwire*,

162 Mass. 143; *Kiefel v. Keppler*, 173 Pa. St. 181.

³ *Maundrell v. Maundrell*, 10 Ves. 246 b, 255; 1 Sugd. Pow. 121; *Greenl. Cruise*, Dig. tit. xxxii. ch. xix. §§ 28, 29, note.

fied, the general effect of the statutes has been to abolish these anomalies and to provide that he who has an absolute, beneficial power of disposing of property in fee simple, whether he has any other right, interest, or estate in it or not, and without any execution of the power, is regarded as the owner in fee simple, in respect to the rights of his creditors, purchasers, and encumbrancers; and, when there is no gift over dependent on his failure to execute the power, he is the owner in fee in all respects.¹ When New York land, for example, is conveyed to A for life, and he is also given "an absolute power of disposition, not accompanied by a trust,"—so that in his lifetime he may dispose of the fee for his own benefit,—he may at once (before any execution of his power) sell it in fee simple, or mortgage it, or it may be taken by his creditors in satisfaction of his debts.² And the same result would follow, if he were given such an absolute power, to be executed by will or deed, and no estate, or any other estate than one for life.³ But this does not give him an absolute fee *for all purposes*, except where the property is not given over to another, "in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts." That is, a grant or devise of such a power to A, but at his death, if he fail to execute the power, the land to go to B, will pass the land to B at A's death, unless A executes the power, or the property is taken by his creditors; but a gift of such a power to A, without any limitation over to B, gives A an absolute fee simple *for all purposes*,—so that, for illustration, it may descend to his heirs at his death.⁴ These statutes are exhaustive, and must be studied in detail for the nice distinctions that have been made in construing them. (a)

(a) The New York statutes are as follows: Real Prop. L. "§ 125.—Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned." "§ 129.—Where an absolute power of disposition, not accompanied by a trust, is given to the owner of a particular

¹ N. Y. L. 1896, ch. 547, §§ 125, 129–133, 139, 142, 144; 1 Stim. Amer. Stat. L. § 1656.

² Jackson v. Edwards, 7 Paige (N. Y.), 386, 400, 401, 22 Wend. 498; Cutting v. Cutting, 86 N. Y. 522, 534; Ackerman v. Gorton, 67 N. Y. 63.

³ Deegan v. Wade, 144 N. Y. 573,

578; Matter of Moehring, 154 N. Y. 423; Fargo v. Squiers, 154 N. Y. 250, 258; Roberts v. Lewis, 153 U. S. 367, 375.

⁴ Taggart v. Murray, 53 N. Y. 223, 238; Jennings v. Conboy, 73 N. Y. 230; Swarthout v. Ranier, 143 N. Y. 499.

Execution of Powers.

§ 633. **Who are able to execute Powers.** — The donee of a power, in executing it, i. e., in doing what it authorizes him to do, acts as the mere agent or instrument of the donor. What

estate for life or for years, such estate is changed into a fee absolute in respect to the rights of creditors, purchasers, and encumbrancers, but subject to any future estates limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts." "§ 130. — Where a like power of disposition is given to a person to whom no particular estate is limited, such person also takes a fee, subject to any future estates that may be limited thereon, but absolute in respect to creditors, purchasers, and encumbrancers." "§ 131. — Where such a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee." "§ 132. — Where a general and beneficial power to devise the inheritance is given to a tenant for life, or for years, such tenant is deemed to possess an absolute power of disposition within the meaning of and subject to the provisions of the last three sections." "§ 133. — Every power of disposition by means of which the grantee is enabled, in his lifetime, to dispose of the entire fee for his own benefit is deemed absolute." "§ 139. — A special and beneficial power is liable to the claims of creditors in the same manner as other interests that cannot be reached by execution; and the execution of the power may be adjudged for the benefit of the creditors entitled." "§ 142. — The execution, wholly or partly, of a trust power may be adjudged for the benefit of the creditors or assignees of a person entitled as a beneficiary of the trust, to compel its execution, where his interest is assignable." "§ 144. — A beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass, respectively, to a trustee or committee of the estate of the person in whom the power or interest is vested, or an assignee for the benefit of creditors." These, in substance, were originally 1 R. S. 733, § 86; 732, §§ 81, 82; 733, §§ 83–85; 734, § 93; 735, §§ 103, 104, respectively.

Real Prop. L. § 133, here quoted, is to be carefully noted as explaining what is meant by "an absolute power of disposition." And see *Cutting v. Cutting*, 86 N. Y. 522, 534. "Where a grantee of an estate for life takes also a power to alien in fee to any person by will, and no other person than the grantee of the power has, by the terms of its creation, any interest in its execution, the power is a general beneficial one," and the grantee can convey in fee by deed, although the instrument creating the life estate and the power attempted to restrain and prohibit any conveyance by deed. *Deegan v. Wade*, 144 N. Y. 573, 578; *Hume v. Randall*, 141 N. Y. 499, 505; *Matter of Moehring*, 154 N. Y. 423, 427; *Roberts v. Lewis*, 153 U. S. 367, 375.

Mr. Chaplin has given, *inter alia*, the following conclusions as to the effects of these statutes, when under any of them the grantee takes a fee: 1. "As to purchasers, the donee holds a fee; he may convey an absolute estate, and as the power is purely beneficial, he is absolutely entitled to

he does is in theory done by the donor through him as an instrumentality.¹ For this reason, a power may be executed at common law, not only by one who could convey the property if it were his own, but also by other persons of sufficient mental ability, such as a married woman or an infant *sui juris*.² Before the modern married women's legislation, a power was the most available means of disposing of her property by a *feme covert*. Owning the land and also a power emanating from the donor, she could convey it, because it was *his* act by her as an instrument. (a)

§ 634. **By whom Powers must be executed — Their Delegation.** — The general rule is that a power must be executed by the donee personally; and, when there are two or more donees, by *all* of them personally. The donees of a power are the instrument of the donor; and ordinarily the instrument that he selects must act, and all of it must act.³ The donor, however,

the proceeds." 2. "As to encumbrancers and creditors, he holds a fee, and they may proceed, in respect thereto, as if the fee were (as it is, in their favor) absolute." 3. "If the power is not exercised, and if the property is not sold for the satisfaction of debts, then any remainder duly limited takes effect." . . . 4. "In all cases, where such (i. e., absolute and beneficial) a power of disposition is given, and no remainder is limited on the estate of the grantee of the power, such grantee is entitled to an absolute fee." Chaplin, *Express Trusts & Powers*, pp. 456, 457. See also the New York authorities cited in connection with text on this topic, i. e., § 632, *supra*. These rules for making a general and beneficial power equivalent to an absolute fee do not apply as long as the power is affected by any condition either precedent or subsequent. They apply only when the power is absolutely vested. Real Prop. L. § 134, which in 1896 first put into statutory form the law as it had previously existed. *Van Axte v. Fisher*, 117 N. Y. 401, 403.

(a) In New York, an infant has not been able effectually to execute a power since 1830. For the statute provides that: "A power may be vested in any person capable in law of holding, but cannot be exercised by a person not capable of transferring real property." Real Prop. L. § 121, originally 1 R. S. 735, §§ 109, 111. See *Temple v. Hawley*, 1 Sand. Ch. 153. But the following section, Real Prop. L. § 122, provides that: "A general and beneficial power may be given to a married woman, to dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee." And the capacity of a *feme covert* to execute any kind of a power is now practically unquestioned. See *Wright v. Tallmadge*, 15 N. Y. 307; *Leavitt v. Pell*, 25 N. Y. 474.

¹ 1 Sugd. Pow. p. 242.

² *Ladd v. Ladd*, 8 How. (49 U. S.) 9, 27; *Leavitt v. Pell*, 25 N. Y. 474; *In re D'Augibau*, L. R. 15 Ch. Div. 228;

Breit v. Yeaton, 101 Ill. 242; 1 Sugd. Pow. pp. 148-155.

³ *Montefiore v. Browne*, 7 H. L. Cas. 241, 261; *Winslow v. Balt. & O. R. Co.*,

may modify this requirement, by clearly indicating when and how the authority, or any portion of it, may be exercised by less than all the persons upon whom it is conferred.¹

So, while the general rule forbids the delegation of powers — *delegatus non potest delegare*, — yet a power that is general in character, or amounts to absolute ownership, and reposes no personal confidence in the donee, may be delegated by him.² What the courts mean by the common statement that a power can not be delegated is that any judgment or discretion required to be exercised by the donee can not be transferred to another. But when this element is not involved, and the power can be as well executed by one sound-minded person as by another, it may be delegated.³ Or, being given to a trustee, such a power may be executed by a substituted trustee.⁴ So, merely ministerial acts connected with the execution of powers may be entrusted by the donees to other persons. And, when a donee in whom special confidence is reposed has duly exercised the judgment or discretion required of him, he may employ others to carry out what he has decided shall be done. Having a power to sell land, for example, and having decided to sell it for a certain sum, he may properly authorize his attorney to carry out and close the sale accordingly.⁵

§ 635. **Survival of Powers.** — Powers coupled with an interest in the property, such for example as a power of sale given to a mortgagee, or powers coupled with a trust duty, may usually be executed by the survivors or survivor of the several donees, in case some of them die or become incapacitated.⁶

188 U. S. 646; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45; *Cruise*, Dig. tit. xxxii. ch. xvii. §§ 74, 75; 1 *Perry on Trusts*, § 294.

¹ *Wilder v. Ranney*, 95 N. Y. 7; *Neel v. Beach*, 92 Pa. St. 221. An illustration is a power given to be executed by the donee "*or his assigns*." *Cruise*, Dig. tit. xxxii. ch. xvii. §§ 77, 78.

² *Crooke v. County of Kings*, 97 N. Y. 421; *Cruise*, Dig. tit. xxxii. ch. xvii. §§ 79-84.

³ *Farwell*, Pow. (2d ed.) p. 445. And it is for this reason that, while a power with personal confidence given to an executor terminates at his death, when no such confidence exists it ordinarily passes to an administrator with

the will annexed. *Greenland v. Waddell*, 116 N. Y. 234; *Clifford v. Morrell*, 22 N. Y. App. Div. 470.

⁴ *Ibid.*; *Lahey v. Kortright*, 132 N. Y. 450; *Boutelle v. City Sav. Bk.*, 17 R. I. 781.

⁵ *Gates v. Dudgeon*, 173 N. Y. 426.

⁶ *Co. Lit.* 112 b; *Peter v. Beverly*, 10 Pet. (35 U. S.) 532; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 20; *Taber v. Willetts*, 37 N. Y. Supp. 233; *Sites v. Eldredge*, 45 N. J. Eq. 632; *Wilkinson v. Buist*, 124 Pa. St. 253; *Benneson v. Savage*, 130 Ill. 352. And it has been shown that a power of sale annexed to a mortgage now usually passes with an assignment of the mortgage. § 493, *supra*.

They act wholly or partially for themselves, or in performance of a moral obligation; and those who can act should be allowed to do so. Other powers, such, for illustration, as an authority given to executors to sell land, are more readily destroyed by the disability or death of one or more of the donees. Here the common law distinguishes between a power conferred upon the donees *nominatim*, i. e., by naming them individually, and one given to them as a class. When the donation is of the former kind, as "to A, B, and C," or "to my executors (or trustees, etc.), A, B, and C," the death of any one of them, or his permanent inability to act for any cause, terminates the power.¹ But when it is of the latter kind, as "to my executors," without naming them individually, or "to my trustees," or "to the children of A," the power survives as long as two or more of the donees remain — while the *class* as such can still be said to exist.²

With regard to executors, this distinction has been everywhere somewhat changed by legislation. The statute 21 Hen. VIII. ch. 4, by which the executor or executors who qualify may execute a power of sale though others named refuse to take the office, has been uniformly re-enacted or adopted in this country.³ And the general rule here may be said to be that a power of sale given to executors may be executed by those of them who accept and enter upon their duties as such; and when any interest legal or equitable in the property is also vested in them, as when, for example, they are made testamentary trustees, it may be executed by the survivors or survivor of those who so take the office.³ And in New York, and possibly some other states, the statute provides that, if one or more of the donees of *any* power *die* before its execution, it may be executed by the survivor or survivors.⁴ (a) Such

(a) The statute of 27 Hen. VIII. ch. 4, was re-enacted by the early legislation of New York (2 Jones & Var. 96; 2 R. L. 366), and now, somewhat amplified, is in two distinct statutes — Code Civ. Pro. § 2642, and

¹ Co. Lit. 113 a, Hargrave's note; *Peter v. Beverly*, 10 Pet. (35 U. S.) 532, 564; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543, 554; *Glover v. Stillson*, 56 Conn. 316.

² *Ibid.*; *Niles v. Stevens*, 4 Denio (N. Y.), 399; *Bradford v. Monks*, 132 Mass. 405; *Chandler v. Rider*, 102 Mass. 268; *Bontelle v. City Sav. Bk.*, 17 R. I. 781; *Weimar v. Fath*, 43 N. J. L. 1;

In re Murphy's Estate, 184 Pa. St. 310; 1 Perry on Trusts, § 294.

³ N. Y. R. S. (9th ed.) p. 1881 (2 R. S. 109), § 55; 4 Kent's Com. p. *326, note (d). See *Lippincott v. Wikoff*, 54 N. J. Eq. 107; *O'Rourke v. Sherwin*, 156 Pa. St. 285.

⁴ N. Y. L. 1896, ch. 547, § 146; N. Y. Code Civ. Pro. § 2642.

statutes, however, must be read in the light of the undoubted right of a donor to specify clearly by whom and under what conditions he intends that the power shall or shall not be executed.¹

§ 636. **Execution with the Consent of Persons other than the Donees.**—Not only may a power be given to several donees, thus making all of them the *one instrument* of the donor, but it may also be conferred on one or more donees, not to be executed, however, without the consent of the donor, or of one or more third parties. Such a requirement must be strictly complied with, in order to make a valid execution of the power. And the death of any one or more of those whose consent is so required, *per se*, terminates the power, because it makes its

R. S. (9th ed.) p. 1881 (2 R. S. 109), § 55. The substance of the first of these is that, where power to sell, mortgage, or lease real property is given to executors, as such, or as trustees, or as executors and trustees, if any neglect to qualify, the power may be executed by those who do qualify. And the substance of the second is that, when realty is devised to executors to be sold, or is ordered to be sold by them, if any of them neglect or refuse to assume the execution of the will, those who do assume it may execute the power. And then the Real Property Law adds, generally: "§ 146. Where a power is vested in two or more persons, all must unite in its execution; but if before its execution, one or more of such persons dies, the power may be executed by the survivor or survivors." The section last quoted was originally 1 R. S. 735, § 112. It is to be noted that it saves the power in no case except that of the *death* of one or more of the donees. *Herriott v. Prime*, 87 Hun, 95. None of these provisions in terms saves a power of sale once vested in executors, some of whom resign or are removed; and it is doubtful if they were intended to do so. But there are some judicial utterances to the effect that they were intended to cover such cases, and others that the court may fill such a vacancy and its donee may act with those named by the testator who have qualified. See *In re Van Wyck*, 1 Barb. Ch. 565; *Fleming v. Burnham*, 100 N. Y. 1; *Chaplin on Express Trusts and Powers*, §§ 633–638. There is also an important *dictum* that, if power of sale be given to "executors hereinafter named," this is the same as if the testator said the power was to belong "to the *persons* whom I have hereinafter named as executors;" hence they do not take the power "as executors," but as individuals, and any of them named who do not qualify must nevertheless join in executing the power, or it will not be validly executed. *Dominick v. Michael*, 4 Sand. 374. *Contra*, *Madden v. Madden*, 23 L. R. Ir. 167, 172. See, also, *Royce v. Adams*, 123 N. Y. 402; *Greenland v. Waddell*, 116 N. Y. 234; *Mott v. Ackerman*, 92 N. Y. 539; *Conklin v. Egerton*, Adm., 21 Wend. 430; *Taylor v. Morris*, 1 N. Y. 341; *Leggett v. Hunter*, 19 N. Y. 445.

¹ *Kissam v. Dierkes*, 49 N. Y. 602; *v. Prime*, 87 Hun (N. Y.), 95; *Hunter Fleming v. Burnham*, 100 N. Y. 1; *v. Anderson*, 152 Pa. St. 386; *Robinson v. Allison*, 74 Ala. 254. *Wilder v. Ranney*, 95 N. Y. 7; *Herriott*

execution impossible. In the absence of modifying statutes, there is no case in which consent of the survivors can then save or restore the power, unless such an emergency is provided for in its creation.¹

Since the first day of October, 1896, the statute law of New York has been such that, in case of the death of one or more (less than all) of those whose consent is required, "the consent of the survivor or survivors is sufficient, unless otherwise prescribed by the terms of the power."² (a)

§ 637. **Formalities Requisite to Valid Execution.** — When no mode of executing the power is prescribed in its creation, it may be executed by deed or will, or any other writing. But, when the donor designates the instrument to be used, it must be executed by that instrument. A power ordered to be executed by will can not be executed by deed, and when directed to be executed by deed it can not be executed by will.³ The common law is also very stringent in requiring that all the formalities prescribed by the donor for the execution of a power shall be complied with. No matter how numerous, whimsical, or unessential in themselves they may be, they must

(a) New York Real Prop. L. § 154, which in full is as follows: "Where the consent of two or more persons to the execution of a power is requisite, all must consent thereto; but if, before its execution, one or more of them die, the consent of the survivor or survivors is sufficient, unless otherwise prescribed by the terms of the power." The last clause of this is new, and took effect Oct. 1, 1896, with the rest of the Real Property Law. See § 301. Section 153 of the same act, which was originally in substance 1 R. S. 736, § 122, also requires the consent to be expressed in the instrument executing the power, or in a certificate thereon, subscribed by the person consenting, and, in order to be recorded, acknowledged the same as a deed. Under these statutes, the death of all the persons required to consent will still end the power, unless the donor provides otherwise. *Kissam v. Dierkes*, 49 N. Y. 602; *Gulick v. Griswold*, 14 App. Div. 85. And the donor may still, by explicit language, make the consent of any one or more of them an absolute prerequisite to its valid execution. *Perry v. Tynen*, 22 Barb. 137; *Correll v. Lauterbach*, 14 Misc. 469. See *Hoyt v. Hoyt*, 85 N. Y. 142; *Chaplin on Express Trusts and Powers*, §§ 641-643.

¹ *Hawkins v. Kemp*, 3 East, 410; *Barber v. Cary*, 11 N. Y. 397, 400; 1 Sugd. Pow. 253.

² N. Y. L. 1896, ch. 547, §§ 153, 154, 301.

³ *Wright v. Wakeford*, 17 Ves. 454 a; *Earl of Darlington v. Pulteney*,

Cowp. 260; *Matter of Gardner*, 140 N. Y. 122; *Wilks v. Burns*, 60 Md. 64. A power not directed to be executed by will may be executed by deed, though it is not to take effect till the donee's death. *In re Jackson's Will*, L. R. 13 Ch. Div. 189.

all be fulfilled; for "the person who creates the power has the undoubted right to create what checks he pleases to impose, to guard against a tendency to abuse."¹ And, at common law, one unfortunate result, among others, of the courts' excessive strictness in this regard was that a power otherwise good, but directing any unimportant illegal formality, or the use of an insufficient instrument in its execution, was entirely void.²

The rule still remains everywhere that the kind of instrument (deed or will) prescribed by the donor must be used; and that, when he fails to specify the kind, any writing that can pass the estate is sufficient. But the rigid exactness as to "accumulative ceremonies," as they have been styled, has caused remedial legislation in England and in many of the United States.³ In States with codes similar to that of New York, the general results of the statutes are that the power must be executed by an instrument sufficient to pass the estate, if the donee were its actual owner; the power itself is good though some negligible, invalid formality may be prescribed, merely nominal and unessential conditions may be disregarded, and no formalities of execution, though ordered by the donor, need be observed, "in addition to those which would be sufficient by law to pass the estate." (a)

(a) The New York statutes, Real Prop. L., declare that: "§ 145. A power can be executed only by a written instrument, which would be sufficient to pass the estate, or interest, intended to pass under the power, if the person executing the power were the actual owner." "§ 147. Where a power to dispose of real property is confined to a disposition by devise or will, the instrument must be a written will, executed as required by law. § 148. Where a power is confined to a disposition by grant, it cannot be executed by will, although the disposition is not intended to take effect until after the death of the person executing the power. § 149. Where the grantor of a power has directed or authorized it to be executed by an instrument not sufficient in law to pass the

¹ 4 Kent's Com. p. *330 In the great leading case of *Wright v. Wakeford*, 17 Ves. 454 *u*, this doctrine was pushed to the extreme of making an execution invalid, where the donor required it to be done by a writing "under hand and seal attested by witnesses," and this was done, but the executing deed did not contain any statement that it *was* attested by witnesses. But this decision has been

practically overruled. *Burdett v. Spilbury*, 6 Man. & G. 386; *Ladd v. Ladd*, 8 How. (49 U. S.) 9, 30, 40; 4 Kent's Com. p. *330, note (c).

² 1 Sugd. Pow. 250; 1 Chance, Pow. 310.

³ Stat. 1 Vict. ch. 26, applicable only to wills; N. Y. L. 1896, ch. 547, §§ 145, 147-152; 1 Stim. Amer. Stat. L. §§ 1658, 1659.

§ 638. Powers must be strictly executed. — The common-law exactness as to the instrument and formalities to be employed in the execution of powers, as explained in the preceding section, is simply one of the prominent outcroppings of the universal underlying rule of stringency in regard to them. The intentions of the donor of a power, as to the manner, time, and conditions of its execution, must be scrupulously observed and carried out; or the result is that it is not executed at all. The donees are his instrument; and his wish, in so far as it is legal and unaffected by statute, must be their only guide. The books and cases abound with illustrations of this fundamental principle. (a) A brief summary of two or three more of the most conspicuous of them will here suffice.

A power of sale does not include a power to mortgage, and *vice versa*. This is now recognized as true practically everywhere, unless some language is added such as to evince an intention that the one authority should include the other.¹

estate, the power is not void, but its execution is to be governed by the provisions of this article. § 150. Where the grantor of a power has directed any formality to be observed in its execution, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formality is not necessary to the valid execution of the power." "§ 134. A general and beneficial power may be created subject to a condition precedent or subsequent." "§ 151. Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power." These sections, in substance, were originally 1 R. S. 735, § 113; 736, §§ 115, 116, 118-120, respectively. They practically restrict the instruments that may execute powers to valid deeds and wills. *Matter of Gardner*, 140 N. Y. 122. See *Bostwick v. Beach*, 103 N. Y. 414, 421. And, while they do not interfere with material and important conditions annexed to powers, they abrogate all requirements for unnecessary ceremonies in their execution. *Woerz v. Rademacher*, 120 N. Y. 62, 68; *Kissam v. Dierkes*, 49 N. Y. 602; *Chaplin on Express Trusts and Powers*, §§ 622-627.

(a) In New York, after doing away with unnecessary formalities, the statute reiterates the general common-law requirement as follows: "Except as provided in this article, the intention of the grantor of a power as to the manner, time, and conditions of its execution must be observed; subject to the power of the Supreme Court, to supply a defective execution as provided in this article." Real Prop. L. § 152, which was originally 1 R. S. 736, § 121.

¹ *Bloomer v. Waldron*, 3 Hill (N. Y.), 361; *Woerz v. Rademacher*, 120 N. Y. 62; *Scholle v. Scholle*, 113 N. Y. 261; *Arnoux v. Phyfe*, 6 N. Y. App. Div. 605;

Lesser v. Lesser, 32 N. Y. Supp. 167; *Kent v. Morrison*, 153 Mass. 137; *Greene v. Greene*, 19 R. I. 619; *Atwater v. Perkins*, 51 Conn. 188; *Campbell v.*

Nor does a power of sale give authority to exchange or partition without a sale, or *vice versa*.¹ And when executors are directed to sell or otherwise dispose of testator's real property, they can not validly execute the power unless there is some reasonable requirement for them to do so,—such as to pay debts, or to divide the property among the beneficiaries,²—or unless the power is so broad and complete as to show the testator's wish to place the matter absolutely in their discretion.³ So, a power to appoint to children does not confer a right to give any of the property to grandchildren, unless there is something in the grant to show an intent to include the latter.⁴ But a power of appointment to “issue” authorizes gifts to any of the descendants of the ancestor named.⁵ The clear principle back of all these results is that the donor's legal wish is the absolute law for his donees.⁶

Improper Execution ; Non-Execution.

§ 639. **Excessive Execution of Powers.**—One of the forms of improper execution of powers is that which is excessive, or beyond the authority conferred. The excess may be in the interest conveyed, as where under a power to appoint a life estate a fee simple is attempted to be given; or in the objects or beneficiaries, as where a power to appoint among children is exercised in favor of grandchildren also; or in the annexation of unauthorized conditions to the estates appointed, as where under a power to convey only an absolute life interest a life estate on condition subsequent is attempted.⁷

Foster Howe Ass'n, 163 Pa. St. 609; Loebenthal v. Raleigh, 36 N. J. Eq. 169; Cherry v. Greene, 115 Ill. 591; *In re* Bellinger (1898), 2 Ch. 534.

¹ King v. Whiton, 15 Wis. 684; Carr, Petitioner, 16 R. I. 645; Heard v. Read, 171 Mass. 374; 2 Perry on Trusts, § 769.

² Hetzel v. Barber, 69 N. Y. 1; Trask v. Sturges, 170 N. Y. 482; Mellen v. Mellen, 139 N. Y. 210; Sweeney v. Warren, 127 N. Y. 426; O'Flynn v. Powers, 136 N. Y. 412.

³ Sweeney v. Warren, 127 N. Y. 426; Walter v. Tompkins, 71 N. Y. App. Div. 21. See Kilpatrick v. Baron, 125 N. Y. 751; First Nat. Bk. v. Nat. Broad-

way Bk., 156 N. Y. 459; Loring v. Brodie, 134 Mass. 453.

⁴ Horwitz v. Norris, 49 Pa. St. 213, 217; Thorington v. Hall, 111 Ala. 323; 4 Kent's Com. p. *345.

⁵ 4 Kent's Com. p. *345.

⁶ See also *In re* Perkins (1893), 1 Ch. 283; Dana v. Murray, 122 N. Y. 604; Hillen v. Iselin, 144 N. Y. 365; Bates v. Bates, 134 Mass. 110; First Nat. Bank v. Michigan Trust Co., 105 Mich. 107; Taussig v. Reel, 134 Mo. 530; Pottle v. Lowe, 99 Ga. 576; 2 Perry on Trusts, ch. xxv.

⁷ Sugd. Pow. 498; Tud. Lead. Cas. R. P. 306.

Whenever, in such instances, the excessive and therefore invalid part of the appointment can not be distinguished from that which is valid, the entire scheme of execution must fail.¹ An illustration may be found in an appointment to three children, when the power is to select any two of them. It being impossible to ascertain which two would have been selected if the power had been properly executed, the entire appointment is void. Otherwise, the general principle is "that the execution of the power will not be defeated because of some provision in excess of the power which may be eliminated without disturbing the general scheme."² But in the practical application of that principle equity has always been much more liberal than law. The difference between the two tribunals, in this particular, is that, while a court of law will treat the entire appointment as void unless the excessive part stands out separate and distinct from that which is valid, equity will take care to separate the two and let the good part stand, when this can be fairly and reasonably done. Thus, if the donee of a power to appoint a life estate attempt to execute it by giving a fee, the appointment is wholly void at law; but in equity it results in conferring a life estate.³ Whereas, in both equity and law, an appointment to children and grandchildren is good as to the children, when the power is for their benefit alone;⁴ and in both courts an execution will be upheld, divested of unauthorized conditions which stand out — as they usually do — apart and distinct from the chief scheme of the appointment.⁵ (a)

(a) The New York statute confirms and makes generally applicable the equitable doctrine on this matter, as follows: "A disposition or charge by virtue of a power is not void on the ground that it is more extensive than was authorized by the power; but an estate or interest so created, so far as embraced by the terms of the power, is valid." Real Prop. L. § 157, originally 1 R. S. 737, § 123; *Hillen v. Iselin*, 144 N. Y. 365.

¹ *Alexander v. Alexander*, 2 Ves. Sr. 640; *Little, Ex'or v. Bennett*, 58 N. C. 156; *Myers v. Safe Dep. & Trust Co.*, 73 Md. 413.

² *Hillen v. Iselin*, 144 N. Y. 365, 380; *Horwitz v. Norris*, 49 Pa. St. 213; *Farwell, Pow.* 312.

³ *Alexander v. Alexander*, 2 Ves. Sr. 640; *Sadler v. Pratt*, 5 Sim. 632; *Wickersham v. Savage*, 58 Pa. St. 365; *Sugden, Pow.* 519; *Farwell, Pow.* 312. And so a power to lease for twenty-one

years is validly executed for that period, in equity but not in law, though the attempt be made to execute it for twenty-two or more years. *Ibid.*; *Campbell v. Leach*, *Ambler*, 740; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543, 581.

⁴ *Ibid.*; *In re Brown's Trust*, L. R. 1 Eq. 74; *Horwitz v. Norris*, 49 Pa. St. 213.

⁵ *Saddler v. Pratt*, 5 Sim. 632; *Pep- per's Appeal*, 120 Pa. St. 235; *Cruise, Dig. tit. xxxii. ch. xvii. §§ 54, 55.*

§ 640. **Defective Execution — How far aided by Equity.** —

Where the donee of a power has properly exercised it in part, i. e., has not exhausted his authority, but has made no mistake in that which he has done, as when, being directed to divide several farms, he has rightly divided one of them, the execution is good *pro tanto*.¹ But a defective execution, whether it arises from failure to comply with required formalities, or from an appointment so partial and incomplete that it can not be treated as a perfect act, is wholly nugatory at law.²

Treating that as done which ought to be done, equity corrects defective executions of powers, in favor of certain classes of persons, and in cases in which the failure to execute properly is merely in matter of form and not of the essence of the power. The persons or beneficiaries in whose favor this is done are purchasers, creditors, or lessees, — those who have given value for the appointment,³ — and charities,⁴ and the wife or legitimate children of the appointor.⁵ And the errors in formalities which are so corrected are illustrated by the use of an unsealed instrument when a seal is required,⁶ or by an inaccurate description of the land, or by the attestation of only two witnesses when the terms of the power call for three.⁷ Any mistake merely in the making of the instrument, other requisites of the execution of the power being rightly carried out, will be so aided; and even an execution by will may be thus sustained, although it should have been by deed.⁸ But an execution ordered to be made by will can not be carried out even in equity if made by deed, because this would be to take away its revocable character before the death of the donee.⁹ Neither can a defective execution of a statutory power be relieved in equity, since this would violate the legislative requirements.¹⁰ And wherever the defect is in the substance of the power, as, for example, an appointment to A, when it was only authorized to be made to

¹ Tud. Lead. Case, R. P. 422;

² Chance, Pow. 511.

³ Ibid.; Sugd. Pow. 521.

⁴ Cotter v. Laver, 2 P. Wms. 623; Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Mut. Life Ins. Co. v. Everett, 40 N. J. Eq. 345; Beatty v. Clark, 20 Cal. 11; 2 Chance, Pow. 494.

⁵ Sayer v. Sayer, 7 Hare, 377; 2 Chance, Pow. 497.

⁶ Fothergill v. Fothergill, 1 Eq. Cas. Abr. 222, pl. 9; Morse v. Martin, 34

Beav. 500; Porter v. Turner, 3 S. & R. (Pa.) 108; 2 Sugd. Pow. 93, 94.

⁷ Smith v. Ashton, 1 Ch. Cas. 263.

⁸ Sergeson v. Sealey, 2 Atk. 412; Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175.

⁹ Tollet v. Tollet, 2 P. Wms. 489; Sugd. Pow. 558.

¹⁰ Bentham v. Smith, 1 Chev. Eq. (S. C.) 33; 1 Story's Eq. Jur. § 97.

¹¹ Smith v. Bowes, 38 Md. 463; Farwell, Pow. 343.

B, it can not be corrected as a mere *defect*. Neither can a partial or incomplete appointment, which can not be treated as a distinct, perfect act, be corrected in equity as a mere *defect*.¹ If any aid can be obtained in such cases, it must be on the ground of fraud, or on that of non-execution, as explained in the following section. When equity affords relief in case of the defective execution of a power, it is usually by compelling a conveyance of the property to him to whom it would have gone if the power had been rightly executed in the first instance. (*a*)

§ 641. **Non-Execution — How far Equity corrects.** — When an attempt has been made to exercise a power, but the result is incomplete or imperfect, a basis for equitable relief is afforded in such instances as those mentioned in the last preceding section, because a scheme of proper execution is supplied and appointees are named whose rights should be preserved. On failure of the donee to do anything in regard to the power, this element does not exist. And hence the general rule of equity is not to afford any relief in case of the non-execution of a power, unless there is coupled with it a trust or duty which clearly ought to be performed. Dealing, therefore, with the division of powers into *beneficial* and *in trust*, it may be stated as a settled rule that no court will compel the execution, nor itself execute, those of the former kind. The donee of a beneficial power may appoint to himself, or to others, or to both, as he may choose; and if he prefer not to exercise the right and authority

(*a*) Two different sections of the New York Real Property Law provide for the correction of defective execution of powers. They are: “§ 143. — Where the execution of a power in trust is defective, wholly or partly, under the provisions of this article, its proper execution may be adjudged in favor of the person designated as the beneficiary of the trust.” “§ 160. — A purchaser for a valuable consideration, claiming under a defective execution of a power, is entitled to the same relief as a similar purchaser, claiming under a defective conveyance from an actual owner.” These were originally 1 R. S. 737, §§ 131, 132. While the first of these sections speaks only of powers in trust, and the second of purchasers only, they are to be read as confirmatory and supplementary of equity's power, and not exclusive of other cases of relief. And the New York courts will correct all forms of defect mentioned in the text as calling for equitable assistance. *Bostwick v. Beach*, 103 N. Y. 414, 421; *Barber v. Cary*, 11 N. Y. 397; *Matter of Gantert*, 136 N. Y. 106; *Hillen v. Iselin*, 144 N. Y. 365.

¹ *Austin v. Oakes*, 48 Hun (N. Y.), 492, 496, *aff'd*, 117 N. Y. 577; *Hillen v. Iselin*, 144 N. Y. 365.

which may be utilized to his own advantage, it is proper that he should not be interfered with in his choice.¹

But, a power in trust, in its essential nature, places upon the donee a *duty* to execute it, and thereby to dispose of property, in favor of some person or persons other than himself.² Such a duty in form may be accompanied with entire discretion in the donee as to whether it shall be carried out; or, as is more frequently the case, it may be an absolute requirement, without any such discretion. The proper execution of the latter kind of trust power—the perfect and enforceable obligation which makes the donee similar to a trustee³—will be compelled by equity, if possible, though against his will; or, if he be dead or can not be reached, it will be executed by that court itself.⁴

In summary, then, equity will not move in aid of the non-execution of a beneficial power, nor of a trust power the execution of which is in the entire discretion of the donee; but it will see to the carrying out of the purpose of other powers in trust. (a)

(a) The New York statute emphasizes these results as follows:—“A trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled for the benefit of the person interested. A trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust.” Real Prop. L. § 137, originally 1 R. S. 734, §§ 96, 97. Thus a trust power, not made in its creation wholly discretionary, is as imperative as an active trust. *Dominick v. Sayre*, 3 Sandf. 555; *Downing v. Marshall*, 23 N. Y. 366, 380; *Coleman v. Beach*, 97 N. Y. 545; *Hughes v. Mackin*, 16 App. Div. 291, 295; *Tilden v. Green*, 130 N. Y. 29; *People v. Powers*, 147 N. Y. 104; *Holland v. Alcock*, 108 N. Y. 312; p. 467, *supra*, and cases there cited.

It is to be noted here, also, that, in case of the death of a sole or last surviving donee of a power in trust, the duty devolves on the Supreme Court, and is to be executed by a person appointed by it; and, in case of the resignation or removal of such a donee, a substitute is to be appointed by that Court. In these respects, donees of powers in trust are treated the same as active trustees. Also the new law which restores trusts for charity, and prevents indefiniteness as to beneficiaries from defeating them, is made applicable to *powers in trust* for charity. Real Prop. L. §§ 162, 91–93; pp. 498–503, *supra*.

¹ *Tomkin v. Sandys*, 2 P. Wms. 228 n.; *Towler v. Towler*, 142 N. Y. 371; *Sites v. Eldredge*, 45 N. J. Eq. 632; *Security Co. v. Snow*, 70 Conn. 288; *Sugd. Pow.* 392.

² § 333, *supra*.

³ But note again that the distinction between a trustee and a donee of a power is that the former must have the title, while the latter need not. §§ 332, 333, *supra*.

⁴ P. 467, notes 1 and 2, *supra*.

§ 642. **Execution of Trust Powers by Equity.** — As equity will not allow a valid trust to fail for want of a trustee,¹ so it will not permit a power in trust to go unexecuted because no donee is named, or the donee dies, or for any other reason can not be compelled to act. The court itself will execute an imperative trust power, in cases in which the donee can not be made to perform the duty. And in doing this equity follows, if reasonably possible, any scheme of distribution set forth or outlined by the donor. Otherwise, it acts on the maxim that "equality is equity," and divides the property equally among the beneficiaries.² And, of course, the latter method of appointing is the one most frequently required. Thus, on a gift of land to A for life, "with the right and privilege of disposing of the same by will or devise to his children, if any he should have," if A die without exercising the power, the court will divide the land equally among his children.³ But, when the authority is to distribute to the members of a family according to their necessities or "degrees of poverty," the best considered cases declare that the court will investigate as far as it reasonably can the circumstances and needs of the appointees, and make the distribution accordingly.⁴ There have been some strong dissents, however, against such a rule, and declarations that in all cases of execution by the court the division must be equal.⁵ And in New York the statute expressly requires that the shares of the beneficiaries shall be equal, whenever the court appoints after the death of a donee who had a right of selection. (a)

(a) The words of the New York statute are: — "If the trustee of a power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all the persons designated as beneficiaries of the trust." And it is added that "Where a power in trust is created by will, and the testator has omitted to desig-

¹ See pp. 458, 459, *supra*.

² *Salisbury v. Denton*, 3 Kay & J. 529; *Longmore v. Broom*, 7 Ves. 124; *Dominick v. Sayre*, 3 Sandf. (N. Y.) 555; *Greenland v. Waddell*, 116 N. Y. 234, 242; *Frazier v. Frazier*, 2 Leigh (Va.), 642; *Glover v. Coudell*, 163 Ill. 566; 1 *Perry on Trusts*, § 255.

³ *Smith v. Floyd*, 140 N. Y. 337.

⁴ *Gower v. Mainwaring*, 2 Ves. Sr. 87; *Hewett v. Hewett*, 2 Eden, 332; *Bull v. Bull*, 8 Conn. 48; 1 *Perry on Trusts*, § 255. Some judges have de-

clared that it is impossible, or inconsistent with the dignity of the court, "to distinguish between degrees of poverty." But it seems clear that dignity should not stand in the way if the thing can be intelligently and reasonably done. See Lord Hardwicke's opinion in *Gower v. Mainwaring*, *supra*, and Mr. Perry's remarks, in his work on trusts, § 255.

⁵ *Ibid.*; *Withers v. Yeadon*, 1 Rich. Eq. (S. C.) 324; *McNeilledge v. Galbrath*, 8 S. & R. (Pa.) 42.

§ 643. **Fraud on Powers — Illusory Appointments.** — Fraud on powers and the constructive trusts that arise from it have been heretofore explained.¹ (a) One of the instances of such fraud, which the equity tribunals early recognized and corrected, was an illusory appointment. By this was meant the giving of a share that was merely nominal or unsubstantial to one or more of a class among which the donee was directed to distribute. For, unless the power was expressly made to be “exclusive” — so that the donee was directly authorized to give all the property to one or more and nothing to the others, if he so elected — an appointment among a class of designated beneficiaries, as to the children of the appointor for example, must be made by giving a substantial share to each of them; otherwise it was treated by equity as illusory and fraudulent.²

It was never required, however, that a donee with authority to divide among a class should make the shares of all the appointees equal, unless he was ordered to do so by the terms of the power. The requirement was simply that each beneficiary of a “non-exclusive” power should receive a substantial share of the property.³ Under such a power, a million dollars must not be divided among three persons by giving five dollars each to two of them and all the residue to the third; but the appointment would not be illusory, if in good faith one half of it were given to one of them and one quarter to each of the other two.

nate by whom the power is to be executed, its execution devolves on the Supreme Court.” Real Prop. L. §§ 140, 141, originally 1 R. S. 734, §§ 100, 101. The summary of these provisions is that, when a power in trust is valid, it must be carried out, unless its execution is left in the discretion of the donee; and, when exercised, this must be by dividing the property equally among the beneficiaries, unless a different scheme is clearly provided by the donor or the execution is by a donee with the right of selection. Read *v. Williams*, 125 N. Y. 560, 569; *Hillen v. Iselin*, 144 N. Y. 365; *Smith v. Floyd*, 140 N. Y. 337; *Greenland v. Waddell*, 116 N. Y. 234; *Delaney v. McCormick*, 88 N. Y. 174, 182; *Meldon v. Devlin*, 31 App. Div. 146. See § 643, note (a), *infra*. See also § 641, note (a) *supra*.

(a) The New York statute assimilates trusts and powers in trust, in this respect, by providing that, — “An instrument in execution of a power is affected by fraud, in the same manner as a conveyance or will, executed by an owner or by a trustee.” Real Prop. L. § 161, originally 1 R. S. 737, § 125. See *Harty v. Doyle*, 49 Hun, 410; *Matter of Vandevort*, 8 App. Div. 341.

¹ § 402, *supra*.

² *Butcher v. Butcher*, 1 Ves. & Bea.

79; Sugd. Pow. 449, 938; Farw. Pow. 302, 304.

³ *Ibid*.

It was, therefore, often difficult to determine, in specific cases, whether or not the appointment was illusory. There was a broad, debatable territory between appointments that were clearly valid and those that were certainly illusory. Because of this difficulty, the doctrine of illusory appointments has been abolished in England, by a statute which gives entire liberty of choice and distribution among the class or any of its members, to a donee whose method of appointment is not prescribed by the power—to a donee of an “exclusive” power.¹ And in some of the states of this country, such as New York, Pennsylvania and Florida, substantially the same result has been accomplished by statute or judicial determination.² (a) But in other states the doctrine of illusory appointments, as a species of fraud on powers, appears to be still recognized.³

Effects of Execution of Powers.

§ 644. **Relation back to Instrument creating the Power.** — It has been heretofore explained that in executing a power the donee acts merely as the instrument of the donor. The latter makes the appointment through the former. And, therefore, the doctrine of *relation* back applies; and the estate created by the execution of a power takes effect in the same manner as if

(a) The New York statute declares that, — “Where a disposition under a power is directed to be made to, among, or between two or more persons, without any specification of the share or sum to be allotted to each, all the persons designated shall be entitled to an equal proportion; but when the terms of the power import that the estate or fund is to be distributed, among the persons so designated, in such manner or proportions as the grantee of the power thinks proper, the grantee may allot the whole to any one or more of such persons in exclusion of the others.” Real Prop. L. § 138, originally 1 R. S. 734, §§ 98, 99. Thus equality is made the rule of every appointment to a class, unless the donor clearly provides otherwise. The presumption is in favor of the requirement of equal division, in all cases of doubtful construction of powers. *Austin v. Oakes*, 117 N. Y. 577, 590; *Drake v. Drake*, 134 N. Y. 220; *Matter of Conner*, 6 App. Div. 594; *Meldon v. Devlin*, 31 App. Div. 146; *Connor v. Watson*, 1 App. Div. 54.

¹ Stat. 37 & 38 Vict. ch. 37, § 1. The former but unsatisfactory statute was 11 Geo. IV. and 1 Wm. IV. ch. 46. See *Gainsford v. Dunn*, L. R. 17 Eq. 405.

² N. Y. L. 1896, ch. 547, § 138;

Graeff v. De Turk, 44 Pa. St. 527; *Lines v. Darden*, 5 Fla. 51.

³ *City of Portsmouth v. Shackford*, 46 N. H. 423; *McCamant Ex'or v. Nickolls*, 85 Va. 331; *Degman v. Degman*, 98 Ky. 717; *Hatchett v. Hatchett*, 103 Ala. 556.

it had been conveyed by the instrument which created the power.¹ A having deeded a life estate to B in 1890, and also power to B to dispose of the residue of the estate in fee simple; and B having executed the power by will, which took effect in 1900 and gave the fee simple to C; C must regard his estate as conveyed to him by A's deed of 1890, and must determine its validity and effect accordingly.² "The party who takes under the execution of the power, takes under the authority, and under the grantor of the power, whether it applies to real or personal property, in like manner as if the power, and the instrument executing the power, had been incorporated in one instrument."³ Therefore, for illustration, in a jurisdiction in which the common law still forbids a husband to convey *his own* real property directly to his wife, he may validly execute a power in her favor, because she takes not from him but from the donor. And in like manner, by means of a power, she may act as the medium through which the donor conveys directly to her husband.⁴ So, property appointed in 1896, by virtue of a power given by a will which took effect in 1878, is not subject to a transfer tax first imposed by a law of 1892, where the tax law itself is not made retroactive; for the transfer to the appointee — the source of his title — was in the will of 1878.⁵ (a) This doctrine of relation as applied to powers — reading the appointee's title back into the instrument which gives the power, and so testing its validity and effect — is incomparably the most important feature of this technical but interesting subject. Some of its results have been necessarily dealt with in preceding sections; and its important operation in regard

(a) By the New York Tax Law (L. 1896, ch. 908), § 220, the transfer tax on property passing by virtue of the execution of a power is now to be determined by regarding the donee for this purpose the same as if he were the owner; and this whether the power was created before or after the passage of the statute. Thus the common law rule of relation is changed in this particular. *Matter of Seaver*, 63 App. Div. 283; *Matter of Rogers*, 71 App. Div. 461, 464.

¹ *Cook v. Duckenfield*, 2 Atk. 562; *Lord Braybrooke v. Atty.-Gen.* 9 H. L. Cas. 150; *Matter of Harbeck*, 161 N. Y. 211; *Fargo v. Squiers*, 154 N. Y. 250, 258; *Sewall v. Wilmer*, 132 Mass. 131; Co. Lit. 113 a.

² *Ibid.*; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45; *Bingham's Appeal*, 64

Pa. St. 345; *Roach v. Wadham*, 6 East, 289; *Sugd. Pow.* 242.

³ 4 Kent's Com. p. *337.

⁴ *Hall v. Bliss*, 118 Mass. 554; *Beardsley v. Hotchkiss*, 96 N. Y. 201, 212; 1 Chance, Pow. ch. vii.

⁵ *Matter of Harbeck*, 161 N. Y. 211.

to the suspension of the power of alienation will be hereafter explained.

But this important principle is a fiction of law — “*relatio est fictio juris*” — which, while operating between the parties and so far testing the validity of the title, will not be permitted to impair the rights of intermediate innocent purchasers or encumbrancers or other strangers to the power. It is a fiction for the advancement of right, and not for the upholding of wrong.¹ And, therefore, if a donor, having conveyed a life estate and power to appoint the fee, sell or mortgage the land to one who does not know of the power, or who justifiedly believes that it will not be utilized, no execution of the power can be made to relate back to its source so as to cut off the interest of such purchaser or mortgagee.² From his own standpoint alone, the appointee owns the property from the time of the creation of the power; but from the standpoint of intervening innocent parties, whose rights would be impaired by the operation of the fiction, he owns it from the time when the power is duly executed and notice thereof, by record of the instrument creating the power or otherwise, is given as required by law. (a)

§ 645. **Execution which does not refer to the Power.** — A power may be effectually exercised, when the intent to produce this result is evinced, although the power is not specifically re-

(a) The New York statute reaffirms the common-law doctrine of relation, in regard to powers, as follows: — “An estate or interest cannot be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.” Real Prop. L. § 159, originally, 1 R. S. 737, § 129. But, as at common law, this rule is not allowed to impair the rights of innocent third parties. *Jackson, ex dem. Henderson v. Davenport*, 20 Johns. 537, 546; *Matter of Stewart*, 131 N. Y. 274. And, as a cumulative statute, § 127 of the Real Property Law (originally, 1 R. S. 735, § 107), declares that, — “A power is a lien or charge on the real property which it embraces, as against creditors, purchasers, and encumbrancers in good faith and without notice, of or from a person having an estate in the property, only from the time the instrument containing the power is duly recorded. As against all other persons, the power is a lien from the time the instrument in which it is contained takes effect.” See, also, *Prentice v. Janssen*, 79 N. Y. 478; *Dempsey v. Tayler*, 3 Duer, 73; *Salmon v. Stuyvesant*, 16 Wend. 321; *Tilden v. Green*, 130 N. Y. 29; *Hillen v. Iselin*, 144 N. Y. 365, 378; and, further, as to the effects of this principle on suspension of the power of alienation, § 670, *infra*.

¹ *Matter of Stewart*, 131 N. Y. 274, 281; 4 Kent's Com. p. *338.

² *Ibid.*; *Jackson, ex dem. Henderson v. Davenport*, 20 Johns. (N. Y.) 537.

ferred to in the executing instrument.¹ But the question as to whether or not such an intent exists has given rise to considerable litigation and some important rules as to powers.

It is thoroughly settled everywhere that, when the instrument does not mention the power but could have no material operation except as executing it, it shall be treated as intended to have that effect. Hence the rule that a transfer of land, by one who owns no estate in it and only a power over it, is to be deemed an execution of the power unless a contrary intention clearly appears.² And, for the same reason when the donee's personal interest not subject to the power is so small or of such a nature that the words of the conveyance can not reasonably be regarded as including nothing else, they are treated as executing the power. Thus, if he owned merely a life estate, together with power to convey the fee, his deed or will of the fee has been held as an execution of the power, when he expressed no contrary intention.³ But some courts have treated such a conveyance as transferring only the donee's life estate.⁴

When, on the other hand, the donee owns an interest in the land, to which his conveyance not referring to the power may reasonably be considered to relate, as if he have a one half interest in fee and power to convey the other half, the general rule is that he must show an intent to execute the power, or only his own interest will pass. Having transferred such an estate of its maker, the deed or will has expended its force; and, in the absence of an expressed design of having it execute the power, it can operate no further.⁵ In such cases, most courts are now reasonably liberal, in construing the language

¹ *Lee v. Simpson*, 134 U. S. 572; *Warner v. Conn. Mut. L. Ins. Co.*, 109 U. S. 357, 368; *Ladd v. Chase*, 155 Mass. 417; *Scott v. Bryan*, 194 Pa. St. 41; 4 Kent's Com. p. *334; *Story, Eq. Jur.* § 1062 a.

² *Ibid.*; *Bennett v. Aburrow*, 8 Ves. 609; *White v. Hicks*, 33 N. Y. 383, 393; *McCreary v. Bomberger*, 151 Pa. St. 323; *Bullerdick v. Wright*, 148 Ind. 477. In *Blagge v. Miles*, 1 Story (U. S. Cir. Ct.), 426, the old English rule is stated, and criticised as incomplete, that the intent to execute the power must appear, either (1) by reference to the power, or (2) by reference to the property which is the subject on which the power is to be executed, or (3) because

the instrument will have no reasonable or material operation except as an execution of the power.

³ *Warner v. Conn. Mut. Life Ins. Co.*, 109 U. S. 357; *Rinkenberger v. Meyer*, 155 Ind. 152; *Terry v. Rodahan*, 79 Ga. 278; *Yates v. Clark*, 56 Miss. 212, 216; *Farwell, Pow.* 267.

⁴ *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324; *Towles v. Fisher*, 77 N. C. 437; *Scott v. Bryan*, 194 Pa. St. 41; *Ridgely v. Cross*, 83 Md. 161.

⁵ *Clere's Case*, 6 Rep. 17 b; *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324; *Bell v. Twilight*, 22 N. H. 500; *Phillips v. Brown*, 16 R. I. 279; *Daniel v. Felt*, 100 Fed. Rep. 727; 4 Kent's Com. p. *337.

of instruments as indicating a wish to execute powers, especially when they are dealing with wills, and in favor of purchasers for value.¹ But, in the absence of statutory changes and of substantially clear indication of intent to execute a power, "if there be any legal interest on which the deed" (or other instrument) "can attach, it will not execute a power."²

In England, and in several of the United States of which New York, Pennsylvania, and Michigan are examples, statutes provide that "real property embraced in a power to devise passes by a will purporting to convey all the real property of the testator, unless the intent that the will is not to operate as an execution of the power, appears, either expressly or by necessary implication."³ This reverses the common-law rule, as to powers executed by *such wills*; and causes powers not referred to in them to be executed by them, unless the contrary intent "so clearly appears that it is not to be avoided."⁴ It is also declared by statute in a few of our states, such as New York, Michigan and Wisconsin, that every instrument executed by the donee conveying or creating any estate or charge, which he would have no right to create or convey except by virtue of the power, is to be deemed a valid execution, although the power is not referred to therein.⁵ But this has been decided to be merely declaratory of the common law. And, notwithstanding such a statute, if the donee have an independent interest in the land, either legal or equitable, a conveyance by him by act *inter vivos*, in which he does not mention or refer to his power, affects only his own interest or estate.⁶

In summary, an instrument executes a power when it can have no other reasonable construction; if it can fairly be deemed to operate only on the donee's individual interest in the land, at common law it does not execute a power unless the intent to have it do so appears; in England and several of the United States, by statute, and in a few states by judicial deter-

¹ *Blagge v. Miles*, 1 Story (U. S. Cir. Ct.), 426; *Hassam v. Hazen*, 156 Mass. 93; *Lockwood v. Mildeberger*, 159 N. Y. 181; *Johnston v. Knight*, 117 N. C. 122; 2 Wash. R. P. (6th ed.) § 1698.

² *Lockwood v. Mildeberger*, 159 N. Y. 181, 186, and other authorities cited in last two preceding notes.

³ 1 Vict. ch. 26, § 27; N. Y. L. 1896, ch. 547, § 156; 1 Stim. Amer. Stat. L.

⁴ *Lockwood v. Mildeberger*, 159 N. Y. 181, 186; *Payne v. Johnson's Executors*, 95 Ky. 175; *Machir v. Funk*, 90 Va. 284.

⁵ N. Y. L. 1896, ch. 547, § 155; 1 Stim. Amer. Stat. L. § 1659.

⁶ *Lockwood v. Mildeberger*, 159 N. Y. 181; *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324.

mination without the aid of any statute, a *will* (but not a deed), purporting to convey all the real property of the testator, executes a power owned by him over the land, even though he also owns an individual interest, unless a contrary intent "so clearly appears that it is not to be avoided." (a)

Revocation of Powers and Appointments.

§ 646. **Revocation of Powers.**—The revocation of a power, as distinguished from other causes of its destruction or suspension, is the withdrawal of it,—the termination of the authority which it conferred,—by the act of the donor. A will does not operate before the death of the testator, and until that time is ambulatory or revocable.¹ Therefore, a power created by *will* is not complete, and may be revoked, at any time while the donor, the testator, is living. After his death it is irrevocable, unless in the terms of its creation he has provided a means of bringing it to an end.² But the common law permits a mere naked or collateral power—not coupled with any present interest—when created by *deed*, to be revoked at any time by the donor, unless it is given for a valuable consideration.³ And his death ordinarily terminates such a power.⁴ And it is to be noted that a power is not coupled with an interest merely because the donee is to participate in the proceeds of its execution, as where he has an authority to sell the donor's property to reimburse himself for a loan; but to make a power coupled with an interest there must be a *present* interest or ownership of the property in the donee *before* the execution of the power.⁵ Such is usually a power of sale held

(a) The New York law on this matter is summarized in this last paragraph of the text. The two statutes mentioned in the text are Real Prop. L. §§ 155, 156, originally 1 R. S. 737, §§ 124, 126. And the leading cases, which explain the results here stated, are *Lockwood v. Mildeberger*, 159 N. Y. 181; *Mutual Life Ins. Co. v. Shipman*, 119 N. Y. 324; *New York Life Ins. & T. Co. v. Livingston*, 133 N. Y. 125; *Mott v. Ackerman*, 92 N. Y. 539; *Hutton v. Benkard*, 92 N. Y. 295; *White v. Hicks*, 33 N. Y. 383; *Kibler v. Miller*, 57 Hun, 14, *aff'd*, 141 N. Y. 571.

¹ *Moffett v. Elmendorf*, 152 N. Y. 475; *Langley v. Langley*, 18 R. I. 618; *Schouler on Wills*, §§ 10, 11.

² 2 *Sugd. Pow.* 321; 4 *Kent's Com.* p. *336; *Conover v. Hoffman*, 1 *Abb. Ct. App. Dec.* (N. Y.) 429.

³ 1 *Chance, Pow.* 175. See *Terwill-*

liger v. Ontario C. & S. R. Co., 149 N. Y. 86.

⁴ *Hunt v. Rousmanier's Adm'r*, 8 *Wheat.* (21 U. S.) 174, 207.

⁵ *Ibid.*; *Bloomer v. Waldron*, 3 *Hill* (N. Y.), 361, 365; *Terwilliger v. Ontario C. & S. R. Co.*, 149 N. Y. 86, 94.

by a mortgagee of real property as part of his security, or a power appendant to make leases, owned by a life tenant of the land.¹ Such a power, as are these latter — coupled with a present interest in the property affected by the yet unexecuted power — is irrevocable after the delivery of the deed by which it is granted, or the death of the maker of the will by which it is created, unless an authority to revoke is granted or reserved by the donor in the transaction in which the power is brought into existence.² (a)

§ 647. **Revocation of Appointments — New Appointments.**—

The preceding section has dealt with the act of the donor in revoking or attempting to revoke the *power*. Looking now to the act of the donee in seeking to revoke an *appointment*, it is first to be reiterated that a will is ambulatory and not an operating instrument while the testator lives; and therefore an execution of a power by it is always revocable by him at any time before his death. He may annul appointments by any of the methods by which wills may be revoked, and make new appointments in other wills or codicils.³ But an execution of a power by deed can not be revoked by the donee (appointor) unless he has reserved the right to do so. The uniform rule is that he who executes a power by deed does so once for all; and he can do nothing more by virtue of it, except that for which in executing the power he has reserved the right. If he simply reserve the right to revoke his appointment, he can do this, but can make no new appointment. If he desire to retain the authority to revoke and also to make new appointments, he must expressly reserve both of those rights; and, in order to be continuously retained, both must be likewise reserved in every subsequent execution of the power. And this is true

(a) The New York statute provides that, — “A power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power.” Real Prop. L. § 126, originally 1 R. S. 735, § 108. This has “given due stability to powers,” and prevents “these latent and potent capacities from being made instruments of fraud.” 4 Kent’s Com. p. *337; *Marvin v. Smith*, 46 N. Y. 571, 577. But, of course, since a will does not operate until the testator’s death, this statute does not prevent him while living from revoking a power by revoking or modifying the will in which it is contained. *Conover v. Hoffman*, 1 Abb. Ct. App. Dec. 429; 4 Kent’s Com. p. *336.

¹ *Bergen v. Bennett*, 1 Cal. Cas. (N. Y.) 1, 15; §§ 493, 628, *supra*.

² Last three preceding notes.

³ *Austin v. Oakes*, 117 N. Y. 577, 593; *In re Wells’ Trust*, L. R. 42 Ch. Div. 646; Sugd. Pow. 321.

even when the instrument creating the power authorizes the donee to make appointments and revoke them at pleasure.¹ Thus, if authority be given to A to dispose of the use in a piece of land (or in states like New York of the legal estate) and to revoke his appointments and make new ones, if he give the property to B without saying anything about revocation his authority is at an end ; if he give it to B and simply reserve the right to revoke the gift, he may do the latter, and then his authority ceases ; but if in appointing to B he expressly retain the right to annul the gift and bestow the property on others, he may do both of these things, and may continue the ability to do so by reserving both rights every time he executes the power.²

“In a deed executing a power, a power of revocation and new appointment may be reserved, though the deed creating the power does not authorize it ; and such powers may be reserved *toties quoties*.”³

Extinguishment and Suspension of Powers.

§ 648. **Extinguished by Execution, or Cessation of Object.**—A power is, of course, terminated by its complete execution. And some powers are of such a nature, as for example an authority to sell a lot of land in one piece, that a single execution brings them to an end.⁴ Others are given so that they may be exercised from time to time until exhausted, such as an authority to sell off a large tract of land in separate lots, or to dispose of a fee by giving a life estate to one person and the remainder to another.⁵

Again, a power naturally terminates with the ending of the object for which it was given.⁶ Thus, a right to dispose of

¹ *Evans v. Saunders*, 1 Drew. 415 ; *Ward v. Lenthal*, 1 Sid. 343 ; *Malcolm v. Beuford-Hancock* (1896), 2 Ch. 173 ; *Farwell, Pow.* 271 ; 4 *Kent's Com.* p. *336.

² Doubts have been expressed by Mr. Sugden and Chancellor Kent as to that part of the rule here stated, which forbids new appointments in the absence of reservation of that power by the donee even though his power is given both to appoint and to revoke. “It may be doubted whether the case

of *Ward v. Lenthal*” (1 Sid. 343) . . . “is sufficient to warrant the doctrine, that a power of revocation in a deed executing a power will not authorize the limitation of new uses.” 4 *Kent's Com.* pp. *336, *337, and note (a).

³ 4 *Kent's Com.* p. *336.

⁴ See *Asay v. Hoover*, 5 Pa. St. 21 ; *Fritsch v. Klausling*, 11 Ky. L. 788 ; *Farwell, Pow.* 35.

⁵ *Farwell, Pow.* 35.

⁶ *Hetzel v. Barber*, 69 N. Y. 1 ; *Mills v. Husson*, 140 N. Y. 99, 103 ; *Wooster*

realty for the purpose of carrying out a trust or settling an estate ceases with the ending of the trust or the winding up of the estate.¹ So, an authority to sell for the benefit of a designated person is extinguished by his death.² And it has been explained already how and when a power may be terminated by its revocation,³ or by the death or incapacity of all or some of the donees,⁴ or of all or some of the persons whose consent is necessary to its valid execution.⁵

When the question arises as to the effect of an act of the donee in extinguishing or suspending a power otherwise than by executing it, the common-law classification of powers assumes its chief importance; and how they may be thus affected is to be considered with reference to, *first*, collateral powers, *second*, powers in gross and *third*, powers appendant.⁶

§ 649. **Collateral Powers not Extinguishable.** — As distinguished from its execution, a power merely collateral — owned by a donee who has no estate in the land, and to be executed for some other person — can not at common law be extinguished or suspended by any act of the donee. He may execute it, or it may terminate for one of the causes explained in the preceding section; but otherwise it must remain as an authority in him to appoint the property.⁷ A collateral power held by the donee *for his own benefit*, such as a right to sell or encumber the land and use the proceeds, may be released (and so destroyed), by the donee, to him who owns the property subject to the power.⁸ But this is as far as the possibility of extinguishing or impairing collateral powers can extend, except by virtue of statute.⁹

v. Cooper, 59 N. J. Eq. 204; Swift's Appeal, 87 Pa. St. 502; Farwell, Pow. 33, 61.

¹ Ibid.; 2 Perry on Trusts, § 498. But before such a result can follow it must be clear that all the purposes of the power are ended. And a power given to a trustee may, of course, continue beyond the trust, when such is clearly the intention of the donor. See McDonald v. O'Hara, 144 N. Y. 566; Heard v. Read, 171 Mass. 374.

² Jackson ex dem. Ellsworth v. Janesen, 6 Johns. (N. Y.) 73; Kissam v. Dierkes, 49 N. Y. 602; Fidler v. Lash, 125 Pa. St. 87; Harmon v. Smith, 38 Fed. Rep. 482; Gerard on Titles, to R. E. (4th ed.) p. 335.

³ § 646, *supra*.

⁴ § 635, *supra*.

⁵ § 636, *supra*.

⁶ It was explained above that this common-law division of powers is chiefly important in its bearing on their suspension or extinguishment. § 627, *supra*.

⁷ West v. Berney, 1 Russ. & M. 431; 4 Kent's Com. pp. *347, *348.

⁸ Ibid.; Sugd. Pow. p. 49; Chance, Pow. § 3105

⁹ By § 52 of the English conveyancing act of 1881, the donee of any collateral power, whether for his own benefit or for the benefit of others, is enabled to release it by deed or contract. Farwell, Pow. 11.

§ 650. **A Power in Gross not coupled with a Duty may be released.** — When a power in gross is also in trust, — so that the donee has a duty to execute it for the benefit of others, — as when he has received a life estate with an obligation to appoint the residue among his children, it can not be released nor extinguished.¹ But other powers in gross may be released to one who has the freehold in possession, reversion, or remainder. And this may be done, where no duty but only a choice to execute rests on the donee, even though the release may be beneficial to him.² Therefore, where a father owned a life estate and such a power to appoint the residue to his daughter or her issue, and in default of appointment the fee was to go to her, a release of his power and a subsequent mortgage by him and her for money which was taken by him were held to be valid.³ And, although a power in gross not coupled with any duty is ordered to be executed by will, it may nevertheless be released, and so extinguished, by deed.⁴ So, though the owner of such a power may have aliened or lost his own estate in the land, he may subsequently execute his power, if this will not impair the interest or rights of the alienee or other taker of his estate.⁵

§ 651. **Powers Appendant may be freely extinguished or suspended.** — A power appendant, i. e., a power the execution of which will derogate from an estate owned by the donee, may be extinguished, either by a release to the owner of a succeeding interest, or by the donee's alienation of his own estate.⁶ Thus if land be devised to A for life, with power to make leases for twenty-one years, remainder to B and his heirs, A may release his power to B and so terminate it; or A may extinguish it by selling his life estate to C without reserving the power, for thereafter he could not execute it in derogation of his own grant.⁷ For the same reason, if an owner in fee

¹ Dunne's Trust, L. R. 1 Ir. 516; Cunynghame v. Thurlow, 1 Russ. & M. 436, n.; Atkinson v. Dowling, 33 S. C. 414; Chance, Pow. § 3121.

² West v. Berney, 1 Russ. & M. 431; Smith v. Death, 5 Madd. 371; Smith v. Somes (1896), 1 Ch. 250.

³ Smith v. Somes (1896), 1 Ch. 250.

⁴ Albany's Case, 1 Rep. 107 a; Zouch v. Woolston, 2 Burr. 1136; Chance, Pow. §§ 3127, 3128; Tud. Lead. Cas. R. P. p. 326.

⁵ Hardaker v. Moorhouse, L. R. 26 Ch. Div. 417; Jones v. Winwood, 3 M. & W. 653; Leggett v. Doremus, 25 N. J. Eq. 122.

⁶ Sugd. Pow. pp. 46, 51.

⁷ Penne v. Peacock, Cas. temp. Talb. 41, 43; Bringlow v. Goodson, 4 Bing. N. C. 726, 734; Armstrong v. Kearns, 61 Md. 364; Chance, Pow. §§ 3157, 3159.

who has also a power to appoint to others in fee sell all his estate without reserving the power, it is wholly extinguished.¹

So, a power appendant may be suspended for a time, by the fact that the donee disposes of a portion of his individual interest in the property. This is illustrated by a lease, say for ten years, made without reference to the power, by a life owner who also has a power to make leases for twenty-one years; or by a mortgage by such an owner, the terms of which mortgage give the right of immediate possession to the mortgagee. Having acted outside of and independently of his power, and thereby having put another person temporarily in possession of the land as lessee or mortgagee, the donee can not then execute his power so as to impair the rights of such mortgagee or lessee. But here the power is only suspended; and it will revive again, if the donee be still living, when the mortgage is satisfied, or the lease terminates, as the case may be.² In such instances as these, it is constantly said that the *power* is suspended, and this is correct if rightly understood. But what is meant is that the *possibility of the complete taking effect of the execution of the power is suspended*. When A, a life tenant with power appendant to make leases, first ignores his power and *as life owner* makes a lease to B for ten years, and then within the ten years attempts to execute his power and thereby to lease the same land to C for twenty-one years, the execution is not void; but it can not take effect, to the extent of giving C the right of possession, until the termination of B's lease. The *effect of the execution* is suspended, however, only so far as this is necessary in order to prevent any impairment of B's rights. Therefore, in a case like this, the execution is valid in that it puts C in A's place as landlord of B. B's existence as tenant prevents C from obtaining the full effect of the execution; and in that sense the power is suspended. Instead of giving C immediate possession, as it would do but for B's rights, the execution of the power makes C the landlord of B, and also makes C the reversioner for the residue of the twenty-one years after the expiration of B's lease.³ (a)

(a) In New York, these rules as to extinguishment, and this last-named result, — simply suspending the effect of the execution of the power,

¹ Garvey v. McDewitt, 72 N. Y. 556; 726; Stover v. Chasse, 6 N. Y. Misc. Roberts v. Cary, 84 Hun (N. Y.), 328, 394; Cruise, Dig. tit. xxxii. ch. 17, §§ 95-97.

71 Minn. 255; Chance, Pow. § 3155.

² Ibid.; Wash. R. P. (6th ed.)

³ Bringlow v. Goodson, 4 Bing. N. C.

§ 1670.

§ 652. **Extinguishment of Powers by Merger.** — After some vacillation by the courts, it has been settled in England, and also in some jurisdictions in this country, that, if by one transaction a power of appointment and also an estate in fee simple are given to the same person, the power is not necessarily merged in the fee; but he may own the two separate and distinct.¹ But it seems that, if one first obtain a power and subsequently and by a different transaction acquire the fee in the same property, the power then becomes merged and extinguished in the estate.²

In states like New York, where the general policy of the statutes is to confer the estate in fee simple on him who has an absolute power of disposal of the land for his own benefit,³ the opinion expressed by Chancellor Kent in his Commentaries, that the ownership in fee will merge any power given to the same person over the same land, has been decided to be the law.⁴

and not technically suspending the power, because of a lease or mortgage outside of the power appendant, — are emphasized by the following statutes: — “The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate, and passes by a grant of such estate unless specially excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to an expectant estate in the property, and shall thereupon be extinguished. A mortgage executed by a tenant for life, having a power to make leases, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein, and the effects on the power of such lien by mortgage are: 1. That the mortgagee is entitled to an execution of the power so far as the satisfaction of his debt requires; and, 2. That any subsequent estate, created by the owner, in execution of the power, becomes subject to the mortgage as if in terms embraced therein.” Real Prop. L. §§ 135, 136, originally 1 R. S. 733, §§ 88–91. The courts are now disposed to be liberal in favor of holding, in doubtful cases, that the power appendant itself has not been destroyed or suspended. *Swarthout v. Ranier*, 143 N. Y. 499; 2 Chance, Pow. p. 599.

¹ *Clere's Case*, 6 Rep. 17 b; *Maundrell v. Maundrell*, 10 Ves. 246, 256; *Sites v. Eldredge*, 45 N. J. Eq. 632; *Sugd. Pow.* pp. 79, 93.

² *Ibid.*; *Farwell*, Pow. p. 31.

³ See § 632, note (a), *supra*.

⁴ 4 Kent's Com. pp. *348, *349; *Jennings v. Conboy*, 73 N. Y. 230, 237; *Hetzel v. Barber*, 69 N. Y. 1.

CHAPTER XXXIX.

d. EXECUTORY DEVISES.

§ 653. Definition and development of executory devises.

§ 654. All four forms of executory interests may be made by devise.

§ 655. Comparison of executory estates and remainders — Preference between them.

§ 656. Growth of future estates in importance — No reverse process at common law.

§ 657. General nature and incidents of executory estates.

§ 658. Executory estates not destructible by preceding owner — Effect of giving him power to exhaust the fee.

§ 659. Interests after "failure of issue," or "failure of heirs," of prior owner.

§ 653. **Definition and Development of Executory Devises.** — An executory devise has been hereinbefore defined as "a future estate created by will, such as could not be made directly by deed at common law."¹ The three methods already explained of creating executory interests — springing uses, shifting uses, and powers — all employed the doctrine of uses, in order to obviate the difficulties due to the refusal of the common-law judges to allow the creation of such estates directly (by disposing directly of the legal estate) by deed.² After some centuries of uncertainty, it was ultimately decided that, by means of a will, all forms of the executory estates might be brought into being, without resort to uses, by *devising* the legal estate directly. And executory interests so created were designated executory devises.³

The cardinal rule for the construction of a will — that the intent of the testator shall be ascertained and carried out as far as possible — goes far, of course, towards giving a reason for the existence of executory devises. But, notwithstanding this

¹ P. 97, *supra*; Fearn, Cont. Rem. pp. 381–386, and Butler's note; 4 Kent's Com. p. * 264; 2 Blackst. Com. p. * 172.

² Ch. XXXVI. *supra*.

³ For discussions of their gradual

recognition after the Statute of Wills, see *Thelluson v. Woodford*, 1 Bos. & P. N. R. 357; *Buckworth v. Thirkell*, 3 Bos. & P. 652, n.; *Jones v. Roe*, 3 T. R. 88, 95; Wash. R. P. (6th ed.) § 1737.

deference to the wish of a testator, the results which emerged would doubtless never have been, if there had not existed the stronger reason in the historical development of wills of real property. From the time of the complete introduction of feuds into England to the enactment of the Statute of Uses, 27 Hen. VIII. (1535), the only interests in realty that could be willed away, except in one or two favored localities, were *uses*. Those equitable estates were freely devised; and the chancellor, within whose exclusive cognizance they were, freely allowed testators to make in them all forms of executory interests. It was decided that the Statute of Uses, by uniting the legal estate with the equitable, forbade practically all wills of uses; and thus was destroyed the possibility of devising any interests in real property.¹ It was natural, if not inevitable, that the succeeding period of five years, during which there were made substantially no valid wills of realty in England, should bring about the Statute of Wills, 32 Hen. VIII. ch. 1, as interpreted and explained by 34 & 35 Hen. VIII. ch. 5. And it was just as natural and logical that, after those statutes had authorized devises of the *legal estates* in all lands held by so-cage tenure (and two-thirds of those held by knight-service), the courts, in construing these latter enactments, treating them as remedial and restorative, should ultimately hold, as they did, that the legislative intent was to bring back the old power and forms of devising as these had existed before the Statute of Uses, and to add the authority to deal in the same manner with the legal interest. And the outcome, in brief, was that any form of devise, which could be made in a use before the Statute of Uses, was permitted to be made in the legal estate after the Statute of Wills.²

§ 654. **All Four Forms of Executory Estates may be directly made by Devise.** — In the chapter explaining generally the nature of executory estates, it was shown that men wanted four kinds of future interests, which they could not make as remainders and the law would not treat as reversions.³ How far those four expectancies can be created by means of uses and powers has been shown in the intervening chapters. It simply remains to be added that all of them may be made by wills, without the necessity of resorting to uses; and that,

¹ See pp. 372, 373, *supra*.

² Digby, Hist. Law R. P. (5th ed.)

p. 582; Wms. R. P. p. *314.

³ Ch. XXXVI. *supra*.

when so made, they are called executory devises. Again naming the four kinds, in the order heretofore employed, the *first* to be noted is that which is similar to a springing use — a freehold estate to arise in the future, without any support — as to a single man and his heirs, to begin when he marries :¹ the *second* is a freehold so to begin in the future as to curtail a preceding estate — similar to a shifting use — as to A and his heirs, but if B return from Rome then to B and his heirs ; or to A for life, but if he cease to live on the land, then to leave him and pass to B :² the *third* is the creation out of a term of years of a freehold estate for one person, and the giving of the residue of the term if any over to another ; as out of a leasehold of one thousand years the granting of a life estate to A, and after his death the residue of the term (the executory interest) to B ;³ and the *fourth* is the making of an estate in form a freehold contingent remainder after an estate less than freehold ; as a devise of land to A for ten years, remainder in fee to a person not yet in being.⁴ Whether made indirectly by uses or directly by wills, these are the only forms of executory estates. And, since the construction of the Statute of Wills was settled in favor of permitting executory devises, all of them have been allowed to be freely and directly created by that form of gift. Wills have been more liberally dealt with, in this respect, than any other method of producing such estates. And, when modern legislators have looked for precedents to guide them in framing the statutes which in many states now permit all kinds of future interests to be made directly (without resort to uses) by deed, they have found them in executory devises.⁵ For example, the entire system of New York legislation, which deals with such interests, may be generally summarized in the statement that its purpose and result were to allow all forms of future estates in real property to be freely made by deed after January 1, 1830, which could

¹ *Leslie v. Marshall*, 31 Barb. (N. Y.) 560-565; *Beard v. Rowan*, 9 Pet. (34 U. S.) 301; *Clarke v. Smith*, 1 Lut. 793, 798; Cruise, Dig. tit. xxxviii. ch. xviii. §§ 1-5.

² *Marks v. Marks*, 10 Mod. 419, 423; *Hatfield v. Sneden*, 54 N. Y. 280, 285; 2 Prest. Abst. p. * 140; § 431, *supra*.

³ *Manning's Case*, 8 Rep. 94 b, 95; *Smith v. Bell*, 6 Pet. (31 U. S.) 68; *Culbreth v. Smith*, 69 Md. 450; 2 Blackst.

Com. p. * 174. That, except as made by will or use, the life estate given in such a case would at common law exhaust the entire term, and leave no residue for the second donee, is explained in § 616, *supra*.

⁴ *Gore v. Gore*, 2 P. Wms. 28; *Harris v. Barnes*, 4 Burr. 2157; *Challis*, R. P. p. 93.

⁵ 1 Stim. Amer. Stat. L. §§ 1421-1427.

be made by will before that date — to assimilate them all to executory devises, and to permit them all to be created directly by deed or will. (*a*)

§ 655. **Comparison of Executory Estates and Remainders — Preference between them.** — It has been shown that the four prominent features of executory devises, which distinguish them from remainders and reversions, are that they do not need any particular estate for support, that by them one freehold estate may be created to take effect in the future in derogation of another, that they enable the grantor of a life estate out of a term of years to make a valid conveyance of the residue of the term, and that by means of them a contingent freehold interest may be limited after a term of years. The common-law judges avoided any of these anomalous results whenever it was possible to do so. Hence the strong tendency, which the law has always shown in cases of doubtful construction, to treat future estates as remainders rather than executory interests. “Where a contingency is limited to depend upon an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise.”¹

(*a*) The New York revisers carried out their express design in a few sections of the statutes of 1830, the most sweeping of which, in its present form, has been heretofore quoted, and is worthy of repetition. It provides that: “Subject to the provisions of this article” (the provisions forbidding too great remoteness in the estates created), “a freehold estate as well as a chattel real may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee or other less estate may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article.” Real Prop. L. § 40, originally 1 R. S. 724, § 24. See § 620, note (*a*), *supra*. And, as heretofore explained, the statute expressly provides for creation of conditional limitations by either deed or will. Real Prop. L. § 43, quoted and explained, § 434, note (*a*), *supra*. And, as to what kinds of freeholds may succeed terms of years, and *vice versa*, the statutes also declare: “A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or

¹ Doe d. Mussell v. Morgan, 3 T. R. 104, 111; Whiteside v. Cooper, 115 763; Dean v. Dean (1891), 3 Ch. 150; N. C. 570.
Nightingale v. Burrell, 15 Pick. (Mass.)

This preference is in harmony with the general rule which requires courts to treat all estates as being as important as the terms and circumstances of their creation will permit. And executory interests, being the least favored, are naturally put at the bottom of the scale. In regard to their present or future character, therefore, the order of importance of estates is, *first*, an estate vested in possession; *second*, a vested remainder, or a reversion when the law has made it; *third*, a contingent remainder; and *fourth*, an executory estate.¹

§ 656. **Growth of Future Estates in Importance — No Reverse Process at Common Law.** — Any estate that follows an executory one must be itself executory.² Thus, if land be devised for life to A, his estate not to begin however until next Christmas, and at his death to B and his heirs if B marry C, B's interest as well as A's is executory.³ But, starting thus at the bottom of the scale, such an estate may rise, either all at once or step by step, as events occur, till it becomes vested in possession. After next Christmas, in the illustration given, A's estate will be so vested; and B, not yet having married C, will have a contingent remainder. If subsequently, while A still lives, B marry C, his estate will become a vested remainder, and at A's death will vest in possession.⁴ Here A's estate, at one event, passes to possession from an executory interest; but B's passes step by step through all the stages of ownership from the lowest to the highest.

In the absence of some enabling statute, the reverse process can not occur; i. e., having taken effect as one of the higher interests, and events transpiring that would defeat it as such, it can not be saved at common law by being treated as belonging to one of the lower forms. For example, when real property is devised to A for life, remainder to the oldest son of B, this, being a contingent remainder as soon as the will operates, must fail at common law if A die before any son of B is in existence. If the devise had been simply to the oldest son of B, without resting it on A's life estate, so that it would have become an executory devise as soon as the will was operative (at the tes-

on the termination thereof. No estate for life shall be limited as a remainder on a term of years, except to a person in being at the creation of such estate." Real Prop. L. §§ 36, 37, originally 1 R. S. 724, §§ 20, 21.

¹ Last preceding note; 4 Kent's Com. p. * 254.

⁸ Ibid.

⁴ Ibid.; Fearne, Cont. Rem. pp. 503-

² Pay's Case, Cro. Eliz. 878; 2 Prest. Abst. 173.

tator's death), B's oldest son could have taken the property whenever he came into existence. But, having started as a valid remainder when the testator died, his interest could not be subsequently sustained by calling it an executory devise.¹ This difficulty is obviated by statutes, such as those of New York, which prevent contingent remainders from being destroyed by the termination of the particular estates before the remainders vest.²

§ 657. **General Nature and Incidents of Executory Interests.**

— At common law, executory interests, like contingent remainders, are not treated technically as *estates*.³ The *right* may be fixed and certain in the owner of such an interest; but, in cases where it is not preceded by any other interest, the entire fee remains in its maker, or in his heirs or residuary devisees, until the happening of the event which causes such future interest to cease to be executory and become vested.⁴ Thus, if land be devised to A, his enjoyment of it not to begin however until next Christmas, the fee simple remains in the heirs of the testator, after his death and until next Christmas when A may take possession; and they have all the income and emoluments in the mean time.⁵ Still the books constantly use the word “estate” (though of course loosely) in speaking of executory interests, whether made by devise or act *inter vivos*. And in states like New York, where contingent remainders are expressly declared to be estates and all expectant interests not dependent on particular estates are assimilated to executory devises, they are all grouped by the statutes within the category of “future estates.”⁶ (a) So treated, they may be

(a) In New York, interests which were executory devises at common law are now called simply “future estates,” and, since many of their char-

¹ *Hopkins v. Hopkins*, Cas. temp. Talb. 44; Cruise, Dig. tit. xxxviii. ch. xx. §§ 28, 29. This principle does not prevent the change of a devise from one form of future estate to another, before the will operates. Thus, if the will in terms give property to A for life, remainder to B's son, and A die before B has any son but while the testator is living, the gift, which was at first in form a contingent remainder, takes effect at the testator's death as a valid executory devise—it is such when it first becomes a determined future estate. *Ibid.*; Wash. R. P. (6th ed.) § 1748.

² See §§ 606, 607, *supra*, and notes.

³ *Fearne*, Cont. Rem. p. 1, note (a).

⁴ *Ibid.*; *Hopkins v. Hopkins*, Cas. temp. Talb. 44; *Ackers v. Phipps*, 3 Cl. & Fin. 667; *Morton v. Funk*, 6 Pa. St. 483.

⁵ *Ibid.* But they can not sell the property in fee, except subject to the executory limitation. *Fisher v. Wister*, 154 Pa. St. 65; *Van Horne v. Campbell*, 100 N. Y. 287.

⁶ N. Y. L. 1896, ch. 547, §§ 25-30; 1 Stim. Amer. Stat. L. §§ 1420-1427; § 564, *supra*.

vested executory estates, as where they depend on no contingency but only enjoyment is postponed, such for example as an estate to a known person to begin next Christmas; or they may be contingent executory estates, as when property is given to A, the enjoyment to begin next Christmas, "if he marry B." ¹

Since there can be no seisin of interests in real property while they are executory, whether they are treated as estates or not, those incidents of its ownership which require seisin such as curtesy and dower, can not attach to such interests.² Neither does the owner of such a future interest have any action at law, unless it is given to him by statute, for waste committed on the land by a preceding owner; but his remedy for such waste is in equity by injunction.³ Nor at common law can a future interest while executory be reached for the debts of its owner, nor can it be aliened by him to a stranger to the title, except by way of an estoppel.⁴

It has always been held, however, since an executory interest was permitted to exist, that it may be released (if its owner be ascertained) to a preceding owner of the same property, or being in fee, it may descend, subject to any contingency on which it depends, to the heirs of its deceased owner, or in like flight be freely disposed of by his devise.⁵ It will thus be seen that, in regard to its descent and devolution, an executory interest is treated by the common law in substantially the same

acteristics have been made by statute different from those of common-law executory devises, it has been said in some cases that there is now no such thing as an executory devise in New York. *Beardsley v. Hotchkiss*, 96 N. Y. 201, 213; *Van Horne v. Campbell*, 100 N. Y. 287, 291; *Tilden v. Green*, 130 N. Y. 29, 47. But all of these statutory estates are most readily and thoroughly understood by starting from their foundations. And the foundation of all the future interests, which are not remainders nor reversions, is the executory devise.

¹ It is often said, from the common-law standpoint also, that executory devises are either vested or contingent. But the word "vested," so used, must mean a *right* vested, and not an estate. See the different senses of the word "vested" explained, §§ 577, 578, *supra*.

² 2 *Scribner on Dower*, pp. 702-704; *Com. Dig. Dower*, A, 5, 6; *Morgan v. Morgan*, 5 *Madd.* 408; *Davis v. Mason*, 1 *Pet.* (26 U. S.) 503; *House v. Jackson*, 50 N. Y. 161.

³ *Co. Lit.* 218 b, u. 122; *Ottinger v.*

N. Y. El. R. Co., 15 N. Y. *Supp.* 18; *Robinson v. Litton*, 3 *Atk.* 209.

⁴ *Lampet's Case*, 10 *Rep.* 46 b; *Jackson d. Varick v. Waldron*, 13 *Wend.* (N. Y.) 178; *Hall v. Chaffee*, 14 N. H. 215; *Smith, Ex. Int.* § 754.

⁵ *Barnitz's Lessee v. Casey*, 7 *Cranch* (11 U. S.), 456; *Miller v. Emans*, 19 N. Y. 384; *Griffin v. Shepard*, 124 N. Y. 70, 75; *Brooks v. Kip*, 54 N. J. *Eq.* 462; *Collins v. Smith*, 105 *Ga.* 525. But, of course, if the owner be not in being or not ascertainable,

way as a contingent remainder.¹ And, where modern statutes have dealt with them in this particular, as in England and New York, both of them, as well as all other forms of future estates, have been declared to be descendible and devisable, and made freely alienable whenever the owner is in being and ascertained.² (a)

§ 658. **Executory Estates not destructible by Preceding Owner — Effect of giving him Power to exhaust the Fee.** — But a radical difference, at common law, between a contingent remainder and an executory estate, is that, with a single exception, the latter can not be defeated or affected by anything that may happen to any preceding estate.³ If, for example, land be devised to A for life, and ten days after his death to B and his heirs; or to A and his heirs, but if B return from Rome then to B and his heirs; nothing that may be done to A's estate, either by his act or otherwise, can alter or impair B's interest. No act of A can change or defeat B's estate.⁴ The single exception exists in case of an executory estate after or in derogation of a fee tail; for the power of the tenant in tail to turn his interest into a fee simple, by a fine or common recovery, or by a deed under modern statutes, enables him to defeat all subsequent estates.⁵ And it hardly needs to be added that, when by the terms of the limitation a prior owner is given control over the event on which the subsequent executory estate depends, as if a devise be to A and his heirs, but if A marry

(a) In New York, as heretofore explained, all of these executory interests are "expectant estates." And the statute declares that "An expectant estate is descendible, devisable, and alienable, in the same manner as an estate in possession." Real Prop. L. § 49, quoted also at § 426, note (a), *supra*. This means, that such an estate may be aliened when its owner is in being and ascertained; and not otherwise. It is to be noted, also, that the statute mentions only *estates*. It does not apply to a mere chance, such as a possibility of forfeiture. *Upington v. Corrigan*, 151 N. Y. 143; § 426, *supra*.

such interests can not be assigned. *Ibid.*; 4 Kent's Com. p. *261.

¹ See § 608, *supra*.

² Stat. 1 Vict. ch. 26, § 3; 8 & 9 Vict. ch. 106, § 6; N. Y. L. 1896, ch. 547, § 49; Mass. Gen. Stat. ch. 90, § 37; 1 Stim. Amer. Stat. L. § 1420.

³ *Fisher v. Wister*, 154 Pa. St. 65; *Andrews v. Royce*, 12 Rich. (S. C.) 536, 544; *Van Horne v. Campbell*, 100 N. Y. 287.

⁴ *Ibid.*; *In re Barber's Settled Estate*, L. R. 18 Ch. Div. 624; *Randall v. Josselyn*, 59 Vt. 557; *Parker v. Parker*, 5 Met. (Mass.) 134; *Smith v. Hunter*, 23 Ind. 580.

⁵ *Taylor v. Taylor*, 63 Pa. St. 481; *Den. d. Southerland v. Cox*, 3 Dev. (N. C.) 394; *Cruise*, Dig. tit. xxxii. ch. xxiv. § 30; 2 Prest. Abst. 121.

K then over to B and his heirs, such prior owner may defeat the latter estate — as, in the illustration, by not marrying K.

Since executory interests must ordinarily have this indestructible character, it has been logically held in England, and generally also in this country wherever the matter is unaffected by statute, that there can be no valid executory interest to take effect in derogation of a fee granted or devised to one who is also empowered to exhaust or dispose of the entire property in fee simple — a fee can not be mounted on a prior fee, whose owner can use up or otherwise exhaust all the property. Thus, a devise of land in fee to A, who is expressly or impliedly authorized by the will to live on the proceeds of any of the *corpus* of the property that he may choose to sell, can not be followed by an effectual gift over to B of so much of it, if any, as A may leave undisposed of at his death. The attempted limitation over is void, because it is inconsistent with the absolute ownership and power of disposition of the first taker.¹ The exact scope of this rule, which is a natural and harmonious element of the common law of realty, requires careful attention. It applies only where the first taker has a *fee* and also authority so to dispose of the entire property as to *defeat* the attempted subsequent gift. A devise merely to A and his heirs, but if B

¹ Jackson ex dem. Brewster v. Bull, 10 Johns. (N. Y.) 19; Ide v. Ide, 5 Mass. 500; Roberts v. Lewis, 153 U. S. 367, 378; Van Horne v. Campbell, 100 N. Y. 287; Fisher v. Wister, 154 Pa. St. 65; Evans v. Smith, 166 Pa. St. 625; Knight v. Knight, 162 Mass. 460; St. John v. Dann, 66 Conn. 401; Dodson v. Sevars, 52 N. J. Eq. 611; Howe v. Hodge, 152 Ill. 252; Law v. Douglas, 107 Iowa, 606; Cornwell v. Wulff, 148 Mo. 542; 4 Kent's Com. p. *470. This principle, resting on the solid foundation of Chancellor Kent's approval, and on the decisions generally, a few of which are here cited, has been somewhat criticised by text-writers. See 32 Amer. Law Reg. (N. S.) 1035; Gray, Restraints on Alienation, § 57; 4 Kent's Com. p. *270, note (c). Such criticism, however, strikes not so much at this rule alone as at the entire system of the common-law tribunals in forbidding the creation of executory estates, because they rest on no preceding estates for support. A contingent remainder may be defeated

by the owner of the particular estate, because he has control of the support on which it reposes. But an executory interest, when allowed to exist, has no such support; no prior owner has any control over it; and therefore it is illogical to attempt to make it and to superadd such a control. Wherever, on the other hand, the technical distinctions between remainders and executory interests have been broken down by legislation, and no preceding proprietor is allowed to interfere with subsequent interests except in so far as he is authorized to do so by the terms of the creation of the estates, it is logical and in harmony with the statutory system to allow executory estates after prior fees whose owners may exhaust the entire property. The rule which permits this is in complete accord with modern statutory changes; the rule which forbids it, as stated in the text, is as completely in accord with the logical though technical principles and distinctions of the common law.

return from Rome then to B and his heirs, gives to B a valid executory interest, with which no act of A can interfere. But a devise to A and his heirs, but if B return from Rome then to B and his heirs *if A leave any of the property undisposed of at his death*, gives nothing to B, because there is nothing to give which A can not destroy.¹ So, the rule does not apply to a devise to A for life (or for any other particular estate less than a fee) with power in A to dispose of the residue in fee, and a devise over to B and his heirs in case A does not execute the power.² The attempted gift, that fails by virtue of the rule under consideration, is in derogation of a prior *fee* and de-feasible by the owner of such prior fee.

In New York, and perhaps in a few other states, the same statute which declares that no expectant estate shall be defeated or barred by the termination of a preceding estate, nor by any act of the owner of such preceding estate, also provides that "an expectant estate may be defeated in any manner, or by any act or means which the party creating such estate, in the creation thereof, has provided for or authorized." And it adds that, "An expectant estate thus liable to be defeated shall not, on that ground, be adjudged void in its creation."³ (a)

§ 659. **Interests after "Failure of Issue," or "Failure of Heirs," of Prior Owner.** — A peculiar common-law rule of construction is that, when real property is given over to one person if another "die without issue," or by an equivalent expression, this means, unless otherwise explained by the context, if the issue of the latter ever run out — if there ever come a time when there is no living *issue* of him in the world; and, likewise, a gift to one if another "die without heirs," or its equivalent, means if his heirs ever fail — if there ever come a time when there is no

(a) These are the words of the New York statute. And it is to be noticed that all expectant estates — reversions, remainders, and executory estates alike — are placed on the same basis in this particular. And it seems clear, under this form of legislation, that, by apt words a future estate may be validly limited over to take effect in case the first taker, either in fee or of a lesser estate, does not use up or dispose of the entire property, given to him to be so used if he choose. *Leggett v. Firth*, 132 N. Y. 7; *Swarthout v. Ranier*, 143 N. Y. 499; *Kendall v. Case*, 84 Hun, 124, 127; *Blauvelt v. Gallagher*, 22 Misc. 564.

¹ Last preceding note.

² And the reason for this is that B's estate is a contingent remainder. See *Kent v. Morrison*, 153 Mass. 137; *Bur-*

leigh v. Clough, 52 N. H. 267; *Mulvane v. Rude Ex'or*, 146 Ind. 476.

³ N. Y. L. 1896, ch. 547, § 47; 1 *Stim Amer. Stat. L.* § 1426; *Leggett v. Firth*, 132 N. Y. 7.

living *heir* of him in the world. This is said to be an *indefinite* failure of issue, or of heirs, as the case may be—a failure that may occur at any time in the future, and possibly after the death of many generations yet to come into being.¹ A grant to A and his heirs, but if A die without heirs then to B and his heirs, means that B or his heirs are to take the property in the future, however distant, when there are no living heirs of A. When a different construction is desired, i. e., when the limitation over is intended to take effect on a *definite* failure of issue, then, in the absence of statutory change, this must be shown by the words employed, as to B and his heirs “if A die without issue *at the time of his death*,” or “if A die leaving no issue *behind him*.”² In a word, failure of issue or of heirs, at common law, means *indefinite* failure, unless the settler of the estates or interests makes clear his meaning to the contrary.³

This somewhat arbitrary, not to say erratic, principle has given rise to some of the nicest and most perplexing problems that have been presented to the common-law courts. For it has constantly raised the question, is not the gift over, possibly postponed as it is for many generations not yet in being, too remote to be valid? Can a future estate or interest be good, that perhaps may not take effect in possession until a hundred successive generations have been born and died? Such a question opens the door of the following chapter of this treatise, which discusses the subject of the suspension of the power of alienation of real property. And it will suffice here to note from that chapter simply the statement that such power can not be anywhere suspended—the estate in fee simple must not be made possibly unmarketable—for longer than any number of lives *in being at the time of its creation* and twenty-one years and a fraction of a year over. Therefore, all future interests, to take effect in possession after the indefinite failure of heirs or issue of a designated living person, must be invalid, if they are to

¹ Pleydell v. Pleydell, 1 P. Wms. 748; *In re Edwards* (1894), 3 Ch. 644; Barber v. Pittsburgh, &c. Railway, 166 U. S. 83, 106; Patterson v. Ellis's Ex'or, 11 Wend. (N. Y.) 259; Den. d. Wilson v. Small, 20 N. J. L. 151; Keppner v. Laverty, 70 Pa. St. 70, 72; Burton, R. P. § 665; 4 Kent's Com. pp. *274–*277.

² Forth v. Chapman, 1 P. Wms. 663; Porter v. Bradley, 3 T. R. 143; *Ide v.*

Ide, 5 Mass. 500; Smith v. Kimbell, 153 Ill. 368.

³ 4 Kent's Com. pp. *276–*278. In dealing with personalty, the courts have always been more liberal in holding these words to mean a definite failure of issue, or heirs. Rathbone v. Dyckman, 3 Paige (N. Y.), 9, 30; Morehouse v. Cotheal, 22 N. J. L. 430; Doe d. Allender v. Sussan, 33 Md. 11; 4 Kent's Com. p. *281.

have the effect of making the property inalienable in fee simple — taking it out of the market — until they can vest in possession. Because its owner is unborn, the alienability of such an interest might otherwise be put off for many generations yet to come into existence. The further question, therefore, is, do all gifts made to take effect on an indefinite failure of heirs or issue have the effect of suspending the power of alienation in fee — do they take the fee simple out of the market? If so, they are all invalid, because all are too remote. The answer commonly accepted is that they do so whenever they must be treated as executory interests, so that they can not be defeated but must take effect if at all in the order prescribed by their maker. But, if they may take effect as remainders, they may not suspend the power of alienation at all; and so may be valid future estates.¹ Three illustrations, taken from the generally accepted results of the common-law cases, may make this clear.

First, suppose a devise to A and his heirs, but if A or any other designated person die without *heirs*, then to B and his heirs. Since this confers a fee simple on A in the first instance, and then seeks to give the property over to B on an event that may not occur until far off in the future (the failure of A's heirs — their ceasing to exist — possibly many generations after A's death), the attempted devise to B is void; and A takes the property absolutely in fee simple.²

Second, suppose a devise to A and his heirs, but if X (not A, the first taker, but some other person) die without *issue*, then to B and his heirs. Here again, since this makes the gift to B depend on an event which may be too remote (the failure of X's issue, possibly many generations in the future), the attempted devise to B is void; and A takes the property absolutely in fee simple. B's estate must fail in any such case, where it is limited on the indefinite failure of issue or heirs of a third party, no matter how great or small the estate previously given to A.³

Third, suppose a devise to A and his heirs, or to A and his issue, but if A die without *issue* then to B and his heirs. This being done by will and the intent of the testator being sought,

¹ *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Lion ex dem. Eden v. Burtiss*, 20 Johns. (N. Y.) 483; 4 Kent's Com. p. *273 *et seq.*

² *Ewing v. Barnes*, 156 Ill. 61; *Cooke v. Bucklin*, 18 R. I. 666; *Bur-*

ton, R. P. § 665; 2 Wash. R. P. (6th ed.) § 1755.

³ *Bells v. Gillespie*, 5 Rand. (Va.) 273; *In re Luddy*, L. R. 25 Ch. Div. 394; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104.

A's estate is construed, according to the weight of authority, to be a fee tail, since it will terminate on the failure of his issue — it is the same as if it were to him and his issue, simply, which is the same as to him and the heirs of his body; and the gift to B is a valid *remainder* in the fee simple after A's estate tail.¹ The power of alienation is not suspended at all; for A and B may unite in selling the property in fee simple, or, by modern statutes, where estates tail exist, A alone may convey the entire property in fee simple. In order to make such estates as these by *deed*, and have them both valid, it must be more clearly expressed that A's interest is to be a fee tail; for the courts will make no intendment in favor of a grant, as they will in favor of a devise.²

A careful study of these three typical illustrations, the last of which is the most usual form, shows that, at common law, when a failure of issue or of heirs must be construed as indefinite, which must be done in every case in which a different intention is not expressed, the only case in which a gift after such failure is valid is that in which a *devise* over to another person is on failure of *issue* of him to whom the estate is first given in fee; and that this is because his interest may then fairly be construed as an estate tail, and that which follows it as a remainder.

Estates tail being abolished in most of the states of this country, this last-mentioned case of gift over on failure of issue is also generally invalid, where there does not exist the quite prevalent statutory change of the meaning to be attached *prima facie* to the words "die without issue," or "die without heirs."³ Those statutes, where they exist, reverse the common-law rule of construction and make such expressions mean a *definite* failure of issue, or heirs as the case may be, unless a different intent is clearly expressed. Such is the effect of the legislation of England and a majority of the United States.⁴ An

¹ Barber *v.* Pittsburgh, &c. Railway, 166 U. S. 83; Smith *v.* Kimbell, 153 Ill. 368; Nightingale *v.* Burrell, 15 Pick. (Mass.) 104; Patterson *v.* Ellis's Ex'or, 11 Wend. (N. Y.) 259; Dorr *v.* Johnson, 170 Mass. 540; Morehouse *v.* Cotheal, 22 N. J. L. 430; Taylor *v.* Taylor, 63 Pa. St. 481; Tud. Lead. Cas. R. P. pp. 625, 639.

² Ibid.; Davies *v.* Speed, 2 Salk. 675; Hall *v.* Priest, 6 Gray (Mass.), 18.

³ Lurman *v.* Hubner, 75 Md. 268; Hackney *v.* Tracy, 137 Pa. St. 53.

⁴ Stat. 1 Vict. ch. 26, § 295; N. Y. L. 1896, ch. 547, § 38; 1 Stim. Amer. Stat. L. § 1415; *In re Luddy*, L. R. 25 Ch. Div. 394; *In re Edwards* (1894), 3 Ch. 644; Matter of Moore, 152 N. Y. 602; Ex'or of Condict *v.* King, 13 N. J. Eq. 375; Worrill *v.* Wright, 25 Ga. 657, 659; Faust's Adm'r *v.* Birner, 30 Mo. 414.

example of the results of this change appears when a grant or devise is made to A and his heirs (or issue), and if he die without issue (or heirs) to B and his heirs; and the court holds, as the statute requires, that this means failure of heirs (or issue) *at A's death*, and whether or not it will go to B must be settled at that time; and so both gifts are good, because the power of alienation is suspended only during the life of A, which is a legal suspension.¹ (a) Without the aid of statutes, some courts of this country have arrived at this same result — have held a failure of heirs or issue to be definite, when a different design was not clearly indicated by the grantor or testator.²

(a) The New York statute declares that, — “Where a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words ‘heirs’ or ‘issue’ shall be construed to mean heirs or issue, living at the death of the person named as ancestor.” Real Prop. L. § 38, originally 1 R. S. 724, § 22. The word “remainder” is here used in a general sense, and includes all executory limitations, as well as all remainders technically so called. See *Matter of Moore*, 152 N. Y. 602, 609; *Benson v. Corbin*, 145 N. Y. 351; *Washbon v. Cope*, 144 N. Y. 287, 297; *Chapman v. Moulton*, 8 App. Div. 64.

¹ Last preceding note.

Hill, 74 Pa. St. 173; *Edwards v. Bibb*,

² *St. John v. Dann*, 66 Conn. 401; *Eaton v. Straw*, 18 N. H. 321; *Hill v.*

43 Ala. 666; 4 Kent's Com. pp. *278, *279.

CHAPTER XL.

THE RULES AGAINST PERPETUITIES AND ACCUMULATIONS.

The Rule against Perpetuities.

§ 660. Growth of the rule.

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§ 671. No suspension caused in this country by conditions subsequent, nor by possibilities of reverter or of forfeiture.

§ 672. No perpetuity if prescribed period be not exceeded.

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§ 675. Property generally, corporeal and incorporeal, real and personal, affected by the rule against perpetuities.

The Rule against Accumulations.

§ 676. The common-law rule, and the statutes.

§ 677. Accumulation only during a minority in several states.

The Rule against Perpetuities.

§ 660. **Growth of the Rule.** — The judges have always had to oppose the natural tendency of owners of property toward endeavoring to retain it continuously in their own families by placing clogs upon its alienability. The statute *de donis* is a conspicuous illustration of the force of that tendency, manifesting itself in legislation; and the common recoveries and fines, by which estates tail were ultimately made alienable and the injurious effects of the statute *de donis* obviated, are prominent instances of the courts' successful resistance against such endeavors to "tie up" estates and render them unmarketable. The

Statutes of Mortmain are also instances of legislative opposition to the taking of property out of the market. So long as the only possible forms of future estates were reversions and remainders, — the favorite kinds which could be readily aliened or destroyed, — this trait of human nature had little material upon which it could operate. The statute *de donis* is its most noted manifestation in those early times. But when, after the enactment of the Statute of Uses (1535) and the Statutes of Wills (1540, 1542), executory estates, trusts and powers came prominently before the courts, as being or producing future interests which were in their nature inalienable and indestructible, they brought with them numerous and important questions as to how far men were to be allowed, by these means, to restrict the absolute ownership or the absolute power of alienation of their properties.

Without any material aid from parliament, and proceeding by analogy to the case of strict entails, which could not be protected from fines and recoveries longer than during the life of the first holder and the minority of the second, the courts, both at common law and in equity, answered those questions, one after another, until after several centuries of discussion they finally (in 1833) evolved and settled the rule, that the longest permissible period for vesting of an executory estate “should be *any life or lives in being and twenty-one years after*; to which may be added *a few months more for the case of a posthumous child*”¹ — any number of lives *in being* and twenty-one years (as a period in gross) and a fraction of a year beyond.²

§ 661. **Meanings of the Word “Perpetuity.”** — The law has

¹ Hargrave, Law Tracts, p. 518.

² This restriction was worked out a piece at a time. It was first fixed at one life in being. *Child v. Baylie*, Cro. Jac. 459; *Pells v. Brown*, Cro. Jac. 590. Then it was extended to any number of lives *in being*, by the Duke of Norfolk's Case (3 Ch. Cas. 1), which may be regarded as settling the principle involved; and this change was allowed because it simply makes the measurement the longest life of those named — “the candles are all burning at once.” See also, *Goring v. Bickerstaffe*, Pollexf. 31; *Taylor d. Smith v. Biddal*, 2 Mod. 289. Then, after much debate, the

period of twenty-one years as measuring a minority was added; and, to provide for the case of posthumous offspring, the fraction of a year required for gestation of a child. And, finally, it was settled that the twenty-one years might be made as an absolute period, without regard to any minority. *Cadell v. Palmer*, 1 Cl. & Fin. 372; Digby, Hist. Law R. P. (5th ed.) p. 365. The two centuries required for the working out of this important piece of judicial legislation closed, in 1833, with the final decision of the last-named case. *Lewis on Perpetuity*, pp. 140–162; *Gray, Perpetuities*, ch. v.

always permitted, and still permits, property of any kind to be "tied up," or rendered unmarketable, or largely so, during a reasonable length of time. All are agreed that it is an attempt to clog or restrict its alienability *beyond the reasonable period allowed* that produces a perpetuity. There has been a notable discussion, however, by the authorities (resulting in two distinct rules), as to whether in order to work a perpetuity the restriction must be *absolute*, or merely such as to postpone *vesting* and so to create *remoteness* because of a condition precedent. On the one side of the controversy it is said that no perpetuity can exist, unless for a period beyond that allowed by law the property is made "unalienable though all mankind should join in the conveyance;"¹ on the other side it is contended that a perpetuity arises from every interest which will not become vested till a very remote period, even though as a contingent right or possibility it may be alienable or destructible.² According to the first of these views, no common law remainder, however far postponed in the future it may be, can produce a perpetuity, because if vested it may be sold and if contingent it may be destroyed at any moment by the owner of the present particular estate — by proper proceedings the property may be at once aliened in fee simple.³ But the other view regards a contingent remainder at common law as producing a perpetuity whenever it is such that it may not become *vested in interest* within the prescribed period of a life or lives in being and twenty-one years and a fraction of a year.⁴ The first of these contentions, then, taking the word "perpetuity" in its primary and natural sense, treats the rule against perpetuities as a principle which forbids too long a suspension of the *absolute power of alienation* — prohibits property from being taken wholly out of the market for too long a time. The other, adopting a secondary and artificial meaning of the word "perpetuity," treats the rule as one against "remoteness" — as not only forbidding an undue suspension of the absolute power of alienation, but also precluding all contingen-

¹ Powell, J., in *Scatterwood v. Edge*, 1 Salk. 229, 230; *Cole v. Sewell*, 4 Dr. & War. 1, 28, 2 H. L. Cas. 186; *Birmingham Canal Co. v. Cartwright*, L. R. 11 Ch. Div. 421; *Wms. R. P.* (13th ed.) pp. 274-277; *Challis, R. P.* p. 159; 1 *Perry on Trusts*, § 377.

² Lewis, *Perpetuities*, ch. 16, *supp.*

pp. 97-153; Gray, *Perpetuities*, ch. vii.; *In re Hargreaves*, L. R. 43 Ch. Div. 401; *Winsor v. Mills*, 157 Mass. 362; *Madison v. Larmon*, 170 Ill. 65.

³ Lord Chancellor Sugden, in *Cole v. Sewell*, 4 Dr. & War. 1, 28; *Challis R. P.* p. 159.

⁴ Gray, *Perpetuities*, §§ 285, 286.

cies that are far in the future, even though the property may remain all the time alienable.¹ From either point of view, the rule forbids undue *suspension*; but from one of them it is the suspension of the absolute power of alienation, and from the other the suspension of vesting. Each of these divergent theories needs further separate discussion. Then, treating them together as rules against *illegal suspension*, the law applicable to them both will be explained, together with the different results which arise from this divergence of opinions.

§ 662. **A Perpetuity regarded as an Illegal Suspension of the Absolute Power of Alienation.**—Many of the best authorities in both England and America, following the lead of Lord St. Leonards and Sir Edward Sugden,² have unquestioningly treated the word perpetuity as having its primary and natural meaning; and the rule against perpetuities, which was evolved by the courts through more than two centuries of discussion, as simply and only a rule against illegal suspension of the absolute power of alienation. "The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed."³ For example, a remainder to an unborn person suspends the absolute power of alienation, because there are no persons in being who can convey that remainder, and therefore no persons in being can convey an estate in fee simple in the land.⁴ Until the absolute power of alienation is suspended, say these authorities,—until in the manner just illustrated or in some other way the property is rendered absolutely unmarketable for a time—no question as to a perpetuity can exist. And, when the absolute power of alienation *is* suspended, there is no perpetuity unless the suspension is for a longer period than the law allows. This is the most practical and the most easily applied conception of the rule against perpetuities. And it is the theory on which is based all the legislation of states, such as New York, Michigan, Minnesota, Wisconsin, Kentucky, Alabama, Mississippi, Ohio, Indiana, Iowa, Idaho, California and the Dakotas, in which the matter has been dealt with by statutes.⁵ It re-

¹ Gray, Perpetuities, § 140.

² In *Cole v. Sewell*, 4 Dr. & War. 1, 28.

³ This is the way in which the New York revisers of 1827-1830 declared the meaning of that expression. N. Y.

L. 1896, ch. 547, § 32, originally 1 R. S. 723, §§ 14-16.

⁴ *Haynes v. Sherman*, 117 N. Y. 433; *Sawyer v. Cubby*, 146 N. Y. 192.

⁵ N. Y. L. 1896, ch. 547, § 32; 1 Stim. Amer. Stat. L. §§ 1440-1442;

gards the rule as meant simply to obviate the mischiefs that arise from making property too long inalienable, and so removing it too far from the path of commerce and enterprise. It is believed to be the true theory, which is sanctioned by the cause for the existence of such a principle, by the history of its development and by the weight of authority at the present time.¹

§ 663. **A Perpetuity regarded as an Illegal Suspension of Vesting.**—Mr. Lewis and Mr. Marsden, in their works on Perpetuities, and, following them, Professor Gray have strongly contended that the rise and history of the rule show it to be one against “remoteness” of vesting, rather than against absolute suspension of alienability.² Summarizing the reasons for this view, Professor Gray says: “It is not the inalienability of the interest on a remote contingency, but its utterly uncertain value, which furnishes the sufficient justification, if it was not the original ground, of the rule against perpetuities. If there is a gift over of an estate on a remote contingency, the market value of the interest of the present owner will be greatly reduced, while the executory gift will sell for very little, or, in other words, the value of the present interest *plus* the value of the executory gift will fall far short of what would be the value of the property if there were no executory interest. And further, if the owner of the present interest wishes to convey an absolute fee, the holder of the executory gift can extort from him a price which greatly exceeds what it ought to be, if based on the chance of his succeeding to the property.”³ The English courts, in their recent decisions, appear to have accepted as correct this reasoning and the resulting theory.⁴ And the same is true of the courts of several states of this country, such for example as Massachusetts, Pennsylvania, New Jersey and Illinois.⁵ And this view is said by some writers to express *the* rule against perpetuities.⁶

Chaplin, Suspension of Power of Alienation. Appendix.

¹ See Challis, R. P. p. 159; 4 Kent's Com. p. *267; *Becker v. Chester*, 91 N. W. Rep. (Wis.) 87; Authorities cited at end of § 663, *infra*.

² Lewis, Perpetuity, Supp. pp. 16-19; Marsden, Perpetuities, ch. iii.; Gray, Perpetuities, ch. v.

³ Gray, Perpetuities, § 269.

⁴ *London & S. W. R. Co. v. Gomm*, L. R. 20 Ch. Div. 562; *In re Har-*

greaves, L. R. 43 Ch. Div. 401; *In re Turney* (1899), 2 Ch. 739; *In re Bowles* (1902), 2 Ch. 650; *Moore v. Wingfield* (1903), 1 Ch. 874.

⁵ *Winsor v. Mills*, 157 Mass. 362; *Johnston's Estate*, 185 Pa. St. 179, 189; *Shallcross's Estate*, 200 Pa. St. 122; *Stout v. Stout*, 44 N. J. Eq. 479; *Madison v. Larmon*, 170 Ill. 65; *Chapman v. Cheney*, 191 Ill. 574; *Andrews v. Lincoln*, 95 Me. 541.

⁶ Gray, Perpetuities, § 269; *Tiffany*,

This theory of one of the most important and farthest-reaching principles that the common law has ever produced is an after-thought of text-writers, which has been adopted by some of the courts. It certainly was not the original judicial conception of a perpetuity.¹ The Anglo-Saxon policy as to *values* has generally been to let them regulate and care for themselves. Otherwise, there would doubtless have been numerous rules for compelling alienation by joint tenants and tenants in common, for examples, in many cases of which the price of the interests of some of the owners may be as injuriously affected, by the refusal of the others to sell or release, as if the latter were contingent remaindermen. "*Te teneam moriens*" (dying I will keep you) "is the dying lord's apostrophe to his manor, for which he is forging these fetters that seem, by restricting the dominion of others, to extend his own."² This is Mr. Jarman's epitome of the cause of the rule under discussion—the paternal search of men with families and fortunes for a means of indissolubly uniting the two. It was to counteract this tendency, so injurious to the public, that there arose an application of fines and common recoveries to the barring of estates tail.³ And, when the courts saw the same mischiefs accompanying remote executory interests, they were impelled by the same motives as before to build up a rule for retaining property in the market. They did not mean, at the beginning at least, to build up that rule against common-law contingent remainders, simply because they were *contingent*, but they did mean to raise it against the new forms of future interests that arose after the Statutes of Uses and of Wills—the executory interests—that were bringing with them the new danger to business and commerce.⁴ Mr. Challis, than whom modern times have produced no more astute writer on the law of real property, says: "That the rule against perpetuities applies (apart from express statutory enactment) to legal limitations made by way of re-

Modern Law R. P. § 152; Chaplin, Suspension of Power of Alienation, Preface.

¹ Gray, Perpetuities, ch. v.; Chudleigh's Case, 1 Rep. 119 b, 120 a; Duke of Norfolk's Case, 3 Ch. Cas. 1; Brattle Square Church v. Grant, 3 Gray (Mass.), 142, 156; Becker v. Chester, 91 N. W. Rep. (Wis.) 87; Fowler's Real Prop. Law of N. Y. p. 153.

² 1 Jarman on Wills (ed. 1861), note, quoted in 1 Perry on Trusts, § 377, note 6.

³ Digby, Hist. Law R. P. (5th ed.) pp. 252–258.

⁴ Scatterwood v. Edge, 1 Salk. 229; Duke of Norfolk's Case, 3 Ch. Cas. 1; Cadell v. Palmer, 1 Cl. & Fin. 372; Cole v. Sewell, 4 Dr. & War. 1, 28.

mainder is one of those questions which ought never to have arisen. It implies an anachronism which may be said to trench on absurdity.”¹ As already explained,² the rule must always have applied to contingent remainders, if it were intended to be a rule against remoteness of vesting. In view of an utterance like that of Mr. Challis, supported as it is by long lines of carefully considered cases on both sides of the Atlantic,³ by the opinions of such jurists as Lord St. Leonards,⁴ Sir Edward Sugden,⁵ Mr. Williams⁶ and Chancellor Kent,⁷ by the English Commissioners of real property⁸ and by the practical legislators who have settled this matter by statute in many of the United States,⁹ it seems to be safe to assert that the conception of a perpetuity as a “remoteness” is a digression, made by some of the best courts and text-writers, and that the common-law rule against perpetuities is that which concerns itself simply with the illegal suspension of the *absolute power of alienation*.¹⁰

§ 664. **The Legal Period of Suspension.** — It has appeared from the preceding discussion that the period of legal suspension, finally settled on by the common-law courts after more than two centuries of discussion, is that of a life or lives *in being* and twenty-one years and a fraction afterwards.¹¹ The fraction is measured by the period of gestation of a child; and so the limitation is sometimes said to be within “the period of a life or lives in being (treating a child in its mother’s womb as in being) and twenty-one years afterwards.”¹² Treating thus a child *en ventre sa mère* as in being, there may be two periods of gestation within the legal time of suspension. Thus, if land be devised successively for life to any number of living

¹ Challis, R. P. p. 159.

² § 661, *supra*.

³ Some of the most important of these are *Cole v. Sewell*, 4 Dr. & War. 1, 28; *Stephens v. Stephens*, Cas. temp. Talb. 228; *Birmingham Canal Co. v. Cartwright*, L. R. 11 Ch. Div. 421; *Avern v. Lloyd*, L. R. 5 Eq. 383; *Gilbertson v. Richards*, 4 H. & N. 277, 5 H. & N. 453; *Brattle Square Church v. Grant*, 3 Gray (Mass.), 142; *McArthur v. Scott*, 113 U. S. 340, 381, 383; *Hopkins v. Grimshaw*, 165 U. S. 342, 355; *Manice v. Manice*, 43 N. Y. 303; *Sawyer v. Cubby*, 146 N. Y. 192, 198. Some of these cases present only *dicta*, and the

results in some may be traced to statutes. But they reveal the thought of some of the best judicial minds upon this matter. See Tud. Lead. Cas. R. P. p. 357 *et seq.*

⁴ *Cole v. Sewell*, 4 Dr. & War. 1, 28.

⁵ *Ibid.*

⁶ Wms. R. P. pp. *318, *319.

⁷ 4 Kent’s Com. p. *267.

⁸ Report, vol. 3, pp. 29–31.

⁹ § 662, *supra*.

¹⁰ See, also, 8 Harvard Law Rev. 212.

¹¹ § 660, *supra*.

¹² Judge Gray, in *Hopkins v. Grimshaw*, 165 U. S. 342, 355. And see *Moore v. Wingfield* (1903), 2 Ch. 411.

persons and then in fee to the testator's grandchildren who shall attain the age of twenty-one, the gift is good at common law, although the only grandchild who lives to be twenty-one is a posthumous child of the testator's posthumous child.¹ Such an illustration shows the utmost limitation allowed. The expression "lives in being," in this rule, means in being when the deed is delivered, in case the disposition is by deed; and in being at the death of the testator, when the disposition is by will.² And, bearing in mind that twenty-one years are allowed as an absolute period not measured in any way by lives, a few other illustrations of legal suspension may be profitably noted. A gift of land to trustees, who must hold and not sell it, to pay the net income to designated beneficiaries for twenty-one years, and then to divide the *corpus* among the donor's grandchildren who may be living at that time, is valid, since the suspension is only for twenty-one years.³ A grant in trust, to be held for the benefit of all the members of a class, all of them being then in being, and then in trust for others for twenty-one years after the death of the last member of the class, and then over to ultimate remaindermen in fee, though some of these latter are not in being at the time, is good, because all the ultimate gifts must vest and become alienable immediately at the expiration of the number of lives in the class and twenty-one years beyond. So, any gift by devise to grandchildren of the testator, though they are forbidden to own or alien it till they are of full age, is good; for it can not cause a suspension longer than during the lives of his children and twenty-one years and a fraction beyond.⁴ But a gift for the life of a person *not in being*, and then to his children, is void as causing too great a suspension. And after a grant has been made to A and his heirs, an attempted gift to B in fee if A die without heirs (meaning an indefinite failure of A's heirs — when A's heirs are all dead) is void, because neither B nor his heirs might own or be able to convey the land until many generations yet to be born. So, a devise to all of testator's grandchildren, not to be theirs nor alienable, however, till they are *twenty-two* years of age, is invalid, because one year longer

¹ *Thellusson v. Woodford*, 11 Ves. 112, 143; *Gray*, *Perpetuities*, § 221.

² *McArthur v. Scott*, 113 U. S. 340; *Tud. Lead. Cas. R. P.* p. 361; *Gray*, *Perpetuities*, § 231.

³ *Cadell v. Palmer*, 1 Cl. & Fin.

372; *Connecticut Trust and Safe Deposit Co. v. Hollister*, 74 Conn. 228; *Gray*, *Perpetuities*, §§ 223, 224.

⁴ *Gerber's Estate*, 196 Pa. St. 366; *Eldred v. Meek*, 183 Ill. 26; *Gray*, *Perpetuities*, § 370.

in its scope than the law allows.¹ It is hoped that these few obvious illustrations have made clear the general scope of the common-law rule.

In several of the United States, statutes have cut down the legal period of suspension to a designated *number* of lives *in being*, and not more than twenty-one years and a fraction beyond. Thus, in New York, (a) Michigan, Minnesota and Wis-

(a) The New York statute declares that, — "The absolute power of alienation is suspended, when there are no persons in being by whom an absolute fee in possession can be conveyed. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life and not an absolute term equal to the possible duration of such minority." Real Prop. L. § 32, originally 1 R. S. 723, §§ 14-16. Tersely put, the meaning of this is that, after the property is made unmarketable for two lives in being (lives of A and B), the next gift must be in fee (to C); but it may be validly added, "if C die" (or marry, or any other designated event occur) "before he is twenty-one, it is then to go to D in fee." When D is at the time of the gift an unascertainable person, this may make the property inalienable till it is settled whether or not it is to go to D. And the longest possible period thus involved is during the lives of A and B and the gestation and minority of C. The period thus prescribed can not be measured by any definite time, not associated with lives or a portion of a life. Thus, an attempt to render land inalienable for two years, without reference to the duration of any life or any minority, is void. But if the suspension were made to last for two years, if A (in being) live that long, or until B (in being) becomes of age, so that it must terminate at A's death, or at B's majority or death, if this happen within the two years, it is valid, because its utmost length is during a life in being or a part of such a life. *Smith v. Chesebrough*, 82 App. Div. 578; *McGuire v. McGuire*, 80 App. Div. 63; *Montignani v. Blade*, 145 N. Y. 111; *Steinway v. Steinway*, 163 N. Y. 183; *Cooper v. Heatherton*, 65 App. Div. 561; *Brown v. Brown*, 54 App. Div. 6. So, instructions to an executor to sell land "in the spring," leaving him the power to sell before then, does not suspend the power of alienation. *Deegan v. Wade*, 144 N. Y. 573, 576. See *Henderson v. Henderson*, 113 N. Y. 1. In order to cover all cases of attempted long suspension of real-property ownership, the New York statute also declares that, — "All the provisions contained in this article, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the abso-

¹ Last preceding note; § 660, *supra*.

consin, it is restricted to not more than *two* lives in being, a minority and the period of gestation.¹ And an illustration of the longest legal suspension under these statutes is found in a devise of land in trust, to pay the net income to A during his life, and then to B during his life, A and B both being persons in being at the time of the testator's death; and, after the death of both of them, the land to belong to B's youngest son and his heirs, provided that if such son die before he is twenty-one, the land is to belong in fee simple to the person who may be at that time mayor of New York City. This may cause a suspension during the lives of A and B, two persons in being; then during the gestation of B's youngest son, who may or may not be a posthumous child; and then till that son is twenty-one years old, when he will own the land absolutely and can convey it in fee simple.² It is to be reiterated here, that, in states where such legislation exists, a perpetuity can not exist merely because of the existence of a contingency; but it can arise only because there is a suspension of *the absolute power of alienation* for a period beyond that prescribed by the statute.³ A gift on an indefeasible trust for *three* or more lives in being, for example, must be either wholly or partly void in any of the states just mentioned.⁴

§ 665. **A Legal Suspension must be such as not possibly to exceed the Period allowed.** — In order to be valid, the suspension must be such that it *must* terminate within the period prescribed by the rule against perpetuities. If events *may* so occur as to make it extend beyond that period, it is treated as if such events were sure to occur; and so it is wholly or partly invalid.⁵ If, for example, a testator who dies leaving children devise land to all his grandchildren and the survivors or survivor of them so long as any of them may live, and then to

lute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee." Real Prop. L. § 39, originally 1 R. S. 724, § 23.

¹ N. Y. L. 1896, ch. 547, § 32; Chaplin, Suspension of Power of Alienation, Appendix; 1 Stim. Amer. Stat. L. §§ 1440-1442.

² *Manice v. Manice*, 43 N. Y. 303; *Haynes v. Sherman*, 117 N. Y. 433; *Toms v. Williams*, 41 Mich. 552. See *Chwatal v. Schreiner*, 148 N. Y. 683, 689; *Schlereth v. Schlereth*, 173 N. Y. 444.

³ § 662, *supra*.

⁴ *Hawley v. James*, 16 Wend. 61.

⁵ *Langdon v. Simson*, 12 Ves. 295; *Hanley v. Kansas & T. Coal Co.*, 110 Fed. Rep. 62; *Haynes v. Sherman*, 117 N. Y. 433; *Schlereth v. Schlereth*, 173 N. Y. 444; *Andrews v. Lincoln*, 95 Me. 541.

their issue in fee simple, this is invalid at common law, because otherwise the suspension might continue during the lives of some grandchildren who were not in being at the time of the testator's death; and, even if no grandchild were born after that time, such fact would not save the gift.¹ Its validity must be determined as of the time of the testator's death, when the will operates; and, looking at it from that point of view, it must be treated as if it were sure to continue as long as by any possibility it might continue.

Likewise, in New York, where suspension of alienability is restricted to not more than two lives in being, a minority and a fraction of a year, a devise to testator's grandchildren and the survivors or survivor of them so long as any of them may live, and then to their issue in fee, must be held to be illegal; unless at the time of the death of the testator all his children are dead and there are not more than two grandchildren in existence. If there be a possibility in such a case that other grandchildren may be born, however remote may be the probability of such an occurrence, it is enough to make the suspension illegal.²

But by this principle it is not meant that the instrument creating the suspension is to be construed most strongly against its validity. The gift or limitation is to be sustained, whenever this can be done by any fair construction. And especially is this true when it is made by will. But, after the work of construction is thus done, if it then disclose an intended suspension which would be valid if contingent events were sure to occur in one way and bad if they were sure to occur in another way, it must be held to be invalid — not that the suspension *may*, but that it *must*, terminate within the prescribed period, is the rule.³

§ 666. **The Four Ways of causing Suspension.** — In dealing with the rule against perpetuities, two distinct questions are uniformly to be asked and answered. The *first* is, does any suspension at all exist? And the *second*, if so, may it possibly continue for longer than the prescribed period? It is only when both of these questions are to be answered in the affirm-

¹ *In re Wood* (1894), 3 Ch. 381; *Sears v. Russell*, 8 Gray (Mass.), 86, 100; *Coggins' Appeal*, 124 Pa. St. 10.

² *Haynes v. Sherman*, 117 N. Y. 433; *Dana v. Murray*, 122 N. Y. 604; *Fargo v. Squiers*, 154 N. Y. 250.

³ Last three preceding notes; *Evers v. Challis*, 7 H. L. Cas. 53, 555; *Fowler v. Depau*, 26 Barb. (N. Y.) 224; *Gray, Perpetuities*, §§ 214-215 a; *Lewis, Perpetuity*, p. 170.

ative that a perpetuity exists. And in regard to the first of them, involving as it does the inquiry as to what estates and limitations cause a suspension, it is first to be noted that vested, alienable interests, whether present or future, do not make any suspension whatever. A present estate and a series of absolutely vested remainders, for example, together constituting the fee, no matter how many there may be, do not occasion any suspension, for the reason that there is no contingency involved and all the owners may at any time unite in a conveyance of the property in fee simple.¹ If any illegality exist simply because of a many-linked chain of wholly vested estates, it must be the result of positive statute, which is distinct from the common-law rule against perpetuities. Such a statute exists in New York, and prevents the creation of more than two successive life estates whether vested or contingent.(a)

(a) The New York statutes first declare that, — “Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and on the death of those persons, the remainder shall take effect in the same manner as if no other life estates had been created.” Real Prop. L. § 33, originally 1 R. S. 723, § 17. And then they go on and provide that no remainder shall be limited on an estate *per autre vie* unless such remainder be in fee, nor after an estate *per autre vie* in a term of years unless it be for the whole residue of such term, nor after more than two lives in being which measure such estate *per autre vie*; that no life estate after a term of years shall be limited except to a person in being at its creation; and that no contingent remainder shall be made after a term of years unless it is such that it must vest within or at the end of two lives in being at its creation. Real Prop. L. §§ 34–37, originally 1 R. S. 724, §§ 18–21. Having restricted to two the lives in being during which the absolute power of alienation may be suspended, the object of the revisers by these further statutes was, by an accompanying but distinct rule, to prevent estates of any kind from being projected into the future farther than the period of two successive lives of persons in being when the estates are created. And the net result is that, if a vested remainder in fee be made after three or more successive life estates, it takes effect in possession after the death of the last survivor of the first two life owners named, and the other life owners named get nothing; and, if a contingent remainder in fee be so made, it must be such as to become vested, if ever, and take effect in possession, immediately on the death of the last survivor of the first two life owners named, or it will fail entirely. Thus, a devise

¹ Wood v. Drew, 33 Beav. 610; hunter v. D. M. I. & M. R. Co., 58 Seaver v. Fitzgerald, 141 Mass. 401; Iowa, 205; Gray, Perpetuities, §§ 205–Siddall’s Estate, 180 Pa. St. 127; Wil- 210. ber v. Wilber, 165 N. Y. 451; Tod-

Looking at estates and interests in real property in the order in which they have been discussed in this treatise, it will be found that there are four methods by which suspension may be produced. These are by trusts, contingent remainders or their equivalent, executory estates and interests, and powers. Trusts may do so when the trustees and beneficiaries are precluded for a time from conveying; contingent remainders wherever statutes have forbidden their destruction by preceding owners, and especially when the remaindermen are either not in being or unascertainable; executory interests especially while their owners are uncertain; and powers whenever they temporarily prohibit absolute conveyances by the donees of the powers and by the owners of the property. Each of these requires a brief, separate discussion.

§ 667. **Suspension caused by Trusts.**—In the early common law, and in England down to the present time, no trust, except one for accumulation, has in itself raised any material question as to a perpetuity.¹ A trust for a married woman may make the property inalienable;² but only during her life, and therefore not for an objectionable period. In the ordinary case of a trust (not for accumulations), whether express or implied, in fee or for a lesser interest, the trustee may sell the property, and the beneficiaries if ascertainable may sell their interests. And in England the beneficiaries when their interests are absolute may compel the trustee to convey the legal estate, notwithstanding a direction to the contrary in the instrument which creates the trust.³ Therefore the mere existence of a trust causes no suspension. Hence the generally accepted rule that a trust in fee, whether made expressly, where that is

being made to A for life, then to B for life, then to C for life and then to D in fee, if D's remainder be vested he will acquire the land in possession as soon as A and B are both dead, and C will take nothing; while, if D's remainder be contingent, he also will take nothing unless the contingency be such as to occur so that he may have possession of the land as soon as A and B are both dead. *Purdy v. Hayt*, 92 N. Y. 446; *Dana v. Murray*, 122 N. Y. 604; *Matter of Moore*, 152 N. Y. 602; *Duncklee v. Butler*, 38 App. Div. 99.

¹ *Fox v. Fox*, L. R. 19 Eq. 280; *Hawley v. James*, 16 Wend. 61, 121; *Robert v. Corning*, 89 N. Y. 225; *Hillen v. Iselin*, 144 N. Y. 365, 379; *Ram, Wills*, p. 6. The special rules as to

trusts for accumulations are explained in §§ 676, 677, *infra*.

² See § 336, *supra*.

³ *Brandon v. Robinson*, 18 Ves. 429; *Tatham v. Vernon*, 29 Beav. 604; *Gray, Perpetuities*, §§ 119-121.

possible, (a) or arising as a constructive or resulting trust, works no suspension, and therefore can cause no perpetuity.¹ It may be added, as of course, that a perpetuity may exist in *connection* with a trust when the interest of a beneficiary is made too remote, as in case of a trust simply for the benefit of the grandchild of an unborn person; but this is not *because* of the trust, but because of the remoteness of the interest of the beneficiary. It has been heretofore explained, also, that trusts for charities are not affected by the rule against perpetuities and accumulations.²

In this country, while the practically uniform conclusion is, as in England, that mere trusts in fee whether express or implied cause no suspension, and that charitable trusts may continue perpetually,³ yet it is held in several states, contrary to the English doctrine, that the settler of a trust may render the property inalienable for a time by expressly providing that the trust shall continue and forbidding alienation by either the trustee or *cestui que trust* or both combined.⁴ It is by this means that a spendthrift trust may be made in some of the United States, as already explained.⁵ And in a few of our states, such as New York, Michigan and Wisconsin, the statutes expressly make inalienable the right of a beneficiary of an express trust to receive rents and profits of real property and apply them to his benefit; and they also forbid the trustee to

(a) By the New York system, express trusts can not be made in fee, but only for lives in being. Note, pp. 493-503, *supra*. And resulting and constructive trusts, which are the only kinds that can exist in fee, being implied by law, do not at all suspend the absolute power of alienation. Of the five forms of express trusts, only two, the third (3) and fourth (4) suspend the power of alienation at all. And so the one question, as to a perpetuity arising from a trust, relates to a trust of either of these two forms and is whether or not it suspends the absolute power of alienation longer than during two lives in being and a minority and the period of gestation of a child. Note, p. 494, *supra*; Chaplin, Suspension of Power of Alienation, pp. 138-159.

¹ *In re* Randell, L. R. 38 Ch. Div. 213; *In re* Bowen (1893), 2 Ch. 491; *Hopkins v. Grimshaw*, 165 U. S. 342, 345; *Johnston's Estate*, 185 Pa. St. 179; *Pulitzer v. Livingston*, 89 Me. 359. See, *contra*, *Barnum v. Barnum*, 26 Md. 119; *Missionary Society v. Humphreys*, 91 Md. 131, cases which seem to run counter to all the principles on which the rule against perpetuities is founded.

² § 350, *supra*.

³ Last two preceding notes.

⁴ *Potter v. Couch*, 141 U. S. 296, 314; *Siedler v. Syms*, 56 N. J. Eq. 275; *Winsor v. Mills*, 157 Mass. 362; *Seitzinger's Estate*, 170 Pa. St. 500; *Bigelow v. Cady*, 171 Ill. 229; *Perry on Trusts*, §§ 336 a, 827 a.

⁵ § 335, *supra*.

dispose of the property in contravention of the trust.¹ The outcome, then, is that trusts for the receipt of rents and profits, either to accumulate them or to apply them to the benefit of designated beneficiaries — the third and fourth of the five forms of New York active express trusts — may suspend the absolute power of alienation, even though all the estates and interests be fixed and vested; and may and frequently do raise important questions as to whether or not such suspension is so long as to create a perpetuity. (a)

(a) The first (1) and second (2) of the New York active express trusts are trusts for alienation; and so their existence does not suspend the power of alienation. See note, p. 494, *supra*. The fifth (5) form is for charity, and such a trust may continue perpetually. *Allen v. Stevens*, 161 N. Y. 122, 143. The fourth (4) class, trusts for accumulation, have always been and still are such as to suspend the absolute power of alienation. *Hawley v. James*, 16 Wend. 61, 153; *Radley v. Kuhn*, 97 N. Y. 26, 31. These are explained more in detail in note (a), § 677, *infra*. The third form (3), “To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto,” may continue for the full statutory period of two lives in being, a minority and a fraction of a year. But, because of the statutory prohibition against alienation by the trustee or the *cestui que trust* or both, it ordinarily suspends the absolute power of alienation during the time for which it is made to continue. But, as will be more fully explained hereafter (Note (a), § 670, *infra*), this suspension, and therefore all question as to a perpetuity, may be obviated in case of such a trust, by a power given by the settlor to the trustee (or other donee) to terminate the trust at any time and sell the property. *Robert v. Corning*, 89 N. Y. 225; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Deegan v. Wade*, 144 N. Y. 573, 576. But a power of sale, the exercise of which is not to be accompanied by a termination of such a trust, does not obviate the suspension. *Allen v. Allen*, 149 N. Y. 280, 288.

Before the amendment of § 83 of the Real Property Law by L. 1903, ch. 88, it had been held by the Appellate Division of the First Department that, if the remaindermen who owned the fee were in being and could release their remainders to the *cestuis que trustent* for life, the latter could then terminate the trust and sell the property; and therefore, in such cases, the power of alienation was not suspended by the third (3) form of express trust. *Mills v. Mills*, 50 App. Div. 221. See *Matter of United States Trust Co.*, 175 N. Y. 304. But the form of the statute is now so changed by that amendment (L. 1903, ch. 88) that such a construction is no longer possible. Its present form (Real Prop. L. § 83) is: — “The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person, cannot be transferred by assignment or otherwise, but the right and interest of the beneficiary of any other

¹ N. Y. L. 1896, ch. 547, § 83 (as amended by L. 1903, ch. 88), and §§ 85-87; Chaplin, Suspension of the Power of Alienation, Appendix.

§ 668. **Suspension caused by Contingent Remainders, or their Equivalent.**—Whether or not, at common law, a contingent remainder caused any suspension that might result in a perpetuity has been the subject of much learned discussion. At the foundation of the controversy, however much other matters have been brought into it, is the divergence of view as to what constitutes a perpetuity. Where a perpetuity means simply *undue remoteness of vesting*, as in Massachusetts or Illinois, it may be caused of course—if we are to be at all logical—by the fact that a remainder is to continue to be contingent for too long a time,—*vesting* is too long suspended.¹ Where a perpetuity means illegal suspension of the *absolute power of alienation*, as in New York and Michigan, it can not be caused by any estate which may be sold or terminated at any time, so that the property is all the while marketable in fee simple.² In the absence of statutory change, a contingent remainder may be defeated at any time by the owner of the particular estate.³ Therefore by destruction of the remainder the property may be made alienable in fee simple at any moment. Accordingly, it seems to be safe to assert that, by the weight of authority which treats *the* rule against per-

trust in real property may be transferred. The provisions of this act shall not impair or affect any rights existing at the date of its passage; but the act hereby amended shall have the same force and effect with respect to such existing rights as though this amendatory act had not been passed." The Real Property Law, §§ 85–87, also forbids the trustee to sell in contravention of the trust. He is authorized to lease the land, however, for five years at a time, without the consent of any court; and by permission of the Supreme Court, upon application showing that it is for the best interest of the trust estate, he may lease for a longer period, or sell the land. But it is held that these latter sections (§§ 85–87) do not prevent this form of trust from suspending the absolute power of alienation. The proceeds of a sale thus authorized are not thereby released from the trust; and the *trust fund* as such continues to be tied up and kept out of the market. *Genet v. Hunt*, 113 N. Y. 158, 172; *Robert v. Corning*, 89 N. Y. 225, 236; *Smith v. Secor*, 157 N. Y. 402; *Chaplin, Suspension of the Power of Alienation*, §§ 301, 313. In brief, then, the third (3) form of express active trust suspends the absolute power of alienation, unless the settler prevents this from occurring by giving to some one (normally the trustee) the power to sell the property and terminate the trust at any time.

¹ *Winsor v. Mills*, 157 Mass. 362; *Madison v. Larmon*, 170 Ill. 65; *Wood v. Griffin*, 46 N. H. 230; *In re Frost*, L. R. 43 Ch. Div. 246; *Gray, Perpetuities*, §§ 284–298.

² N. Y. L. 1896, ch. 547, § 32; *Sawyer v. Cubby*, 146 N. Y. 192; *Chaplin, Suspension of the Power of Alienation*, Appendix; § 662, *supra*.

³ § 607, *supra*.

petuities as a rule against too great inalienability, no perpetuity can be caused by a common-law remainder, because it does not at all suspend the absolute power of alienation.¹

Both in England, and generally in this country, statutes have taken away the power of owners of the preceding estates to destroy contingent remainders.² And this fact appears to lend some support to the decisions of courts which hold, as do those of Massachusetts, that a remainder may cause a perpetuity merely by the fact that its *vesting* is too long suspended.³ But, in New York, Michigan, and several other states, the statutes also make contingent remainders freely alienable, when their owners are in being and ascertained.⁴ Therefore, in these latter jurisdictions, where no suspension is forbidden except that of alienability, there can be no perpetuity, because no suspension at all, as the result of any remainder, unless the contingency is as to the person, and not merely as to the event.⁵ Thus, if A grant land to B (in being) for life, remainder to C (in being), and his heirs if C marry D, no suspension of the power of alienation is thereby produced, because A and B and C, representing as they do all the possible interests in the property, may at any time unite in a conveyance of it in fee simple. But, if the grant be to A, B, and C (all in being) and the survivors or survivor of them as long as any one of them lives, and then in fee to an unborn child, this causes a suspension of the absolute power of alienation for three lives in being, for the reason that there is no one who can sell the contingent remainder in fee.⁶ And in New York such a suspension is for one life more than the statute allows, and so it produces a perpetuity.⁷ And, generally, whenever the ultimate gifts, or some of them, are to persons who may not come into being, or may remain unascertainable for too long a time, there is an illegal suspension, though the remainders may be called *vested* subject to open and let in other remaindermen, or subject to be divested. When such remainders result in placing inter-

¹ § 662, *supra*, and authorities cited.

² § 607, *supra*.

³ Gray, Perpetuities, § 286.

⁴ N. Y. L. 1896, ch. 547, § 49; 1 Stim. Amer. Stat. L. § 1420. The form of these statutes is that such estates "are descendible, devisable and alienable, in the same manner as are estates in possession." This means, of

course, that they are alienable when their owners are in being and ascertainable, and otherwise not. See § 608, note (a), *supra*.

⁵ *Sawyer v. Cubby*, 146 N. Y. 192, 198; *Wilber v. Wilber*, 165 N. Y. 451; *Haug v. Schumacher*, 166 N. Y. 506.

⁶ *Ibid*.

⁷ § 664, note (a), *supra*.

ests in such plight that they can not be aliened because their owners can not be reached, they are to that extent, and for the purpose of the rule against perpetuities, *equivalent* to contingent remainders.¹

§ 669. **Suspension caused by Executory Estates.**—It was in the discussion of executory interests, especially executory devises of chattels real, that the rule against perpetuities was matured.² Since the beginning of the seventeenth century, it has been held that, in the absence of statutory change, springing and shifting uses and executory devises are subject to that rule, because they must await the happening of the events on which they are made to depend, and can not be aliened or defeated. And this is true, whichever be the accepted meaning of the word "perpetuity."³ Illustrations are found in a gift over to B on the indefinite failure of the heirs of A, the first taker in fee, and in a grant to X and his heirs for the use of A (in being), and his heirs to begin when A marries. In the first of these, as heretofore explained, the suspension is too long and so results in a perpetuity; in the second it is valid, because it is within the prescribed period.

Modern statutes, such as those of New York, which make all future estates freely alienable when their owners are in being and ascertained, existing as such statutes do in those states where alienability must be absolutely suspended before any question as to a perpetuity can arise, have essentially modified the common-law rule. And in such states, as with contingent remainders so with all executory estates, no sus-

¹ *Sawyer v. Cubby*, 146 N. Y. 192, 198; *Haug v. Schumacher*, 166 N. Y. 506; *Chaplin, Susp. Pow. Alien.* §§ 124-129.

² *Duke of Norfolk's Case*, 3 Ch. Cas. 1; *Scatterwood v. Edge*, 1 Salk. 229; *Cole v. Sewell*, 4 Dr. & War. 1, 28; *Brattle Square Church v. Grant*, 3 Gray (Mass.), 142; *Becker v. Chester*, 91 N. W. Rep. (Wis.) 87; 4 Kent's Com. pp. *266-*268; *Gray, Perpetuities*, §§ 148-185, 317.

³ *Ibid.* The fact that the owner of an executory devise may release it to the preceding owner in possession (see § 657, *supra*) seems not to have obviated the objection that a perpetuity might result, even when the owner of the executory interest was in being and cap-

able of giving such a release. *Ibid.*; *Scatterwood v. Edge*, 1 Salk. 229. This fact is one of the strongest arguments in favor of the view that the common-law rule against perpetuities is one against remoteness, and not simply against inalienability. See *Lewis, Perpetuity, Supplement*, 13-20; *Gray, Perpetuities*, § 268.

The following paragraph of this section of the text explains that now, in states like New York where no perpetuity can exist unless the *absolute* power of alienation is unduly suspended, all doubt on this point is avoided by the decisions that no suspension whatever is caused by an executory interest owned by one by whom it may be sold or released.

pension exists, and consequently no possibility of a perpetuity, except when the owner of the future interest is not in being or not ascertainable.¹ (A devise, for example, by A, to B and his heirs, but if B sell intoxicating liquors there then to C and his heirs, does not suspend the absolute power of alienation for a moment, if B and C are living, known persons; because B and C and the heirs of A, representing as they do all possible interests in the property, may at any time unite in a conveyance of it in fee simple. But a grant or devise to A, B, and C, and their heirs, provided, however, that if they all die without leaving any issue, the property is to belong to the oldest son of D, who now has no son, or to the person who shall then be president of the United States, suspends the absolute power of alienation for three lives in being; and in New York causes a perpetuity.²

§ 670. **Suspension caused or obviated by Powers.** — There are three ways in which powers may be involved in questions concerning perpetuities. The *first* of these is where the execution of the power is postponed by the terms of its creation; the *second*, where the execution of the power results in taking the title out of the market for a time, and the *third*, where it is sought by means of a power to obviate an otherwise illegal suspension.

First. A power of appointment or disposition, which is to belong to a person not yet in being or not ascertainable, or the execution of which is postponed to the future by the terms of its creation, ordinarily causes a suspension of alienability until it can be validly exercised. The donee of the power can not sell the property until that time arrives; nor can the owner of the property dispose of it freed from the power.³ Thus, a power of appointment to be executed by the child of an unborn person,⁴ or an imperative power to executors to sell land but not till thirty years after the testator's death, would be void anywhere.⁵ And a power of sale to executors, not to be exercised till four years (any definite period not measured by a life or lives) after the testator's death, or not till after the death

¹ Mott v. Ackerman, 92 N. Y. 539, 549; Sawyer v. Cubby, 146 N. Y. 192, 198; Chaplin, Susp. Pow. Alien. § 77.

² Ibid.

³ Bristow v. Boothby, 2 Sim. & St. 465; Hawley v. James, 16 Wend.

(N. Y.) 61, 175; Dana v. Murray, 122 N. Y. 604; Gray, Perpetuities, §§ 476, 477.

⁴ Ibid.; Morgan v. Gronow, L. R. 16 Eq. 1, 9.

⁵ Marsden, Perpetuity, § 237.

of his three living children is invalid in New York.¹ Where the execution is necessarily postponed, this must not be for longer than the period prescribed by the rule against perpetuities. (a)

Second. In case of a special power at common law, where its execution causes a suspension, the period during which this is to last must be computed from the time of the creation of the power — the delivery of the deed creating it, or the death of the testator when a will creates it — and not from the time of its execution.² Thus, if A give land by will to his son B for life, with special power to appoint the residue to any of B's issue in fee, and B subsequently appoint it for life to one of his children who was not in being when A died, with remainder to that child's children in fee, the appointment is void, because the estates attempted to be given must be tested as if they had been made directly by the will of A, and so tested the gift is for the life of a person (B's child) not then in being.³ This principle does not apply, at common law, to general powers, such as an authority to appoint a remainder in fee to any one; for as to these the suspension is measured from the time of the appointment.⁴ But, in New York, Michigan, Minnesota, Wisconsin, and perhaps some other states, the same principle is applied to all powers; and the statutes declare that "the period during which the absolute right of alienation may be suspended, by an instrument in execution of a power, must be computed, not from the date of such instrument, but from the time of the

(a) In New York, every power in trust is imperative, unless its execution or non-execution is expressly made to depend on the will of the donee. Real Prop. L. § 137. A beneficial power, on the other hand, is not imperative. And it is only a power that must be executed in the future, and that can not be released or destroyed, that can suspend the power of alienation. Therefore, powers in trust, which are not expressly made discretionary and those which are directly ordered to be executed in the future are the ones which may suspend the power of alienation; and, if they do this for a period not authorized, may cause a perpetuity. *Hawley v. James*, 16 Wend. 61, 140, 175; *Hone's Ex'rs v. Van Schaick*, 20 Wend. 564, 566; *Kilpatrick v. Barron*, 125 N. Y. 751; *Chaplin, Susp. Pow. Alien.* §§ 283-300.

¹ *Garvey v. McDevitt*, 72 N. Y. 556; *Underwood v. Curtis*, 127 N. Y. 523, 540.

² *Lewis, Perpetuities*, pp. 483-485; *Challis, R. P. p.* 156; 2 *Prest. Abst. pp.* 165, 166.

³ *Bristow v. Warde*, 2 Ves. 336, 350; *Duke of Marlborough v. Earl Godolphin*, 1 Eden, 404.

⁴ *Ibid.*; *Gray, Perpetuities*, §§ 514-530.

creation of the power.”¹ (a) This is one of the most radically important rules of construction that are applicable to powers.

Third. It is sometimes attempted to obviate an illegal suspension by means of a power to dispose of the property. This, it seems, can not have the desired effect, unless the alienation is to result in terminating the state of affairs which might cause the perpetuity. When, for example, a trust is ordered which of itself will render the property unmarketable for lives not in being, the difficulty is not overcome by giving to the trustee a power of sale, if he must hold the proceeds of the sale upon the same trust. The objection to the perpetuity in the *trust fund* is not removed by a mere power of changing it from one kind of property to another.² But, if the power of disposition may be exercised at any time so as to terminate the trust and thus unfetter the *fund*, it then clearly prevents all suspension; and so may obviate what might otherwise be a perpetuity.³

§ 671. **No Suspension caused in this Country by Conditions Subsequent, nor by Possibilities of Reverter or of Forfeiture.** — The English courts hold that a suspension is caused by the existence of a right of entry for condition broken, — a possibility of forfeiture.⁴ But, uniformly in this country, because such rights may be readily released, it is decided that they cause no suspension whatever. The same is true as to possibilities of reverter belonging to grantors of estates on limitation.⁵ Ac-

(a) This is the language of the New York statute. Real Prop. L. § 158. And § 159, adds: “An estate or interest cannot be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power.” These sections were originally, 1 R. S. 737, §§ 128, 129. And they make the execution of *any* power subject to the doctrine of relation back into the instrument creating the power, for the purpose of determining whether or not it illegally suspends the power of alienation. *Fargo v. Squiers*, 154 N. Y. 250; *Dana v. Murray*, 122 N. Y. 604; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Dempsey v. Tylee*, 3 Duer, 73; *Chaplin*, *Express Trusts & Powers*, § 679. See § 644, *supra*.

¹ N. Y. L. 1896, ch. 547, § 158; 1 Stim. Amer. Stat. L. § 1658; *Fargo v. Squiers*, 154 N. Y. 250.

² *Allen v. Allen*, 149 N. Y. 280, 288; *Haynes v. Sherman*, 117 N. Y. 443; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337; *Brewer v. Brewer*, 11 Hun, 147, *aff'd*, 72 N. Y. 603; *Thatcher v. St. Andrew's Church*, 37 Mich. 264.

³ *Robert v. Corning*, 89 N. Y. 225; *Hillen v. Iselin*, 144 N. Y. 365, 379; *Chaplin*, *Susp. Pow. Alien.* §§ 301-313.

⁴ *Dunn v. Flood*, L. R. 25 Ch. Div. 629; *In re Trustees of Hollis' Hospital* (1899), 2 Ch. 540; *Lewis*, *Perpetuity*, pp. 618, 619. See *contra*, *Challis*, R. P. p. 152.

⁵ *Cowell v. Springs Co.*, 100 U. S.

cordingly, a grant of land to a society, on condition that it shall be used forever as a burying ground, or a devise of an estate to continue until Gloversville shall be incorporated as a village, causes no suspension and in itself can create no perpetuity.¹ And so as to all conditions, annuities, mortgages, judgments, and other liens on or claims against property; they may be released by their owners and thus extinguished, and therefore do not tend to create any perpetuity.²

§ 672. **No Perpetuity if Prescribed Period be not exceeded.**

— The limitations and arrangements which cause suspension — trusts, contingent remainders, executory interests, or powers — may be made for the benefit of any number of persons, in being or not in being, provided they are so made that the allowed period of suspension is not exceeded — the any number of lives in being and twenty-one years and the period of gestation of a child at common law, or in New York the two lives in being and a minority and the period of gestation of a child. It is the illegal tying up of the property and taking it out of the market, not the bestowal of its benefits upon many persons, that produces a perpetuity.³ Therefore, a contingent remainder to the children of an unborn person is good, when it is provided that only those of such children shall take who may be born during the life of a designated person in being — that one designated life measures the suspension, and it is therefore valid.⁴ So, a trust may be made in New York to continue while A and B (both in being) or either of them shall live, and the income paid during that time to any number of persons, as to all of the testator's grandchildren, some of whom may be yet unborn.⁵ Care being taken to designate persons in being, at common law any number and in New York two, beyond whose lives the property is not rendered unmarketable, no perpetuity can arise from any bestowal of its benefits.

55; *Brattle Square Church v. Grant*, 3 Gray (Mass.), 142, 148; *Tobey v. Moore*, 130 Mass. 448; *Upington v. Corrigan*, 151 N. Y. 143; *Thayer v. McGee*, 20 Mich. 195; *In re Stickney's Will*, 85 Md. 79; *Chaplin, Susp. Pow. Alien.* §§ 131–133.

¹ *Hopkins v. Grimshaw*, 165 U. S. 342; *Leonard v. Burr*, 18 N. Y. 96.

² *Hawley v. James*, 16 Wend. (N. Y.) 61, 179; *McGowan v. McGowan*, 2 Duer (N. Y.), 57; *Gray, Perpetuities*,

§§ 562–571; *Chaplin, Susp. Pow. Alien.* §§ 134–141.

³ *Bailey v. Bailey*, 97 N. Y. 460; *Crooke v. County of Kings*, 97 N. Y. 421; *Tilden v. Green*, 130 N. Y. 29, 47; *Chaplin, Susp. Pow. Alien.* §§ 229, 230, 245.

⁴ *In re Bowles* (1902), 2 Ch. 650; *Moore v. Wingfield* (1903), 1 Ch. 874.

⁵ *Schermerhorn v. Cotting*, 131 N. Y. 48; *Woodgate v. Fleet*, 64 N. Y. 566, 571; *Steinway v. Steinway*, 163 N. Y. 183, 194.

§ 673. **Construction favors Legality.** — It has been explained that the suspension, in order to be legal, must be such that it *can not*, and not merely so that it *may not*, continue beyond the prescribed period.¹ A devise suspending the alienability of property during the lives of all the grandchildren of a testator, who dies leaving children, can not be saved merely because there *may* be no grandchild who comes into being after the testator's death — the possibility, however great the improbability, that the suspension may be for a life not in being when the will takes effect is fatal.² This is the rule that applies, after the work of construing the instrument is complete, and the meaning of the language determined. But, in *construing* the words of a grantor or testator, the courts lean towards holding, wherever it is reasonable, that no suspension is made which can possibly continue beyond the legal period. This rule is in harmony with that which prefers to treat remainders as vested, rather than contingent, and otherwise to save and give as great an interest as the language of the instrument will fairly import.³ Two or three prominent instances of the results of this tendency will suffice.⁴

A gift in a will for the lives of the "survivors" of a class means those who survive the testator, unless the contrary is clearly expressed; and so the designated lives are all in being when the will takes effect.⁵

In a state like New York where the number of lives which may measure the suspension of absolute alienability is limited (in New York to two), if a testator tie up property "until my youngest child shall become of age," or by the use of an equivalent expression, this is construed to mean (unless the context shows otherwise) until the majority or death of the testator's youngest child who is living when the will becomes operative — at the time of the testator's death. It does not mean until the majority of the youngest child who may live to reach his majority; and so where there are many children it makes a possible suspension, not during the lives of them all, but only during the minority or life (if he die under age) of the youngest.⁶ Such a construction is not possible, of course,

¹ § 665, *supra*.

² *Ibid*.

³ § 579, *supra*.

⁴ See Chaplin, *Susp. Pow. Alien.*
§§ 500-515.

⁵ *Moore v. Lyons*, 25 Wend. (N. Y.)

119, 123; *Matter of N. Y. L. & W. R. Co.*, 105 N. Y. 89, 92; § 580, *supra*.

⁶ *Matter of Accounts of Mahan*, 98 N. Y. 372; *Becker v. Becker*, 13 N. Y. App. Div. 342; *Horndorf v. Horndorf*, 13 N. Y. Misc. 343, 346.

when a testator who dies leaving children causes a suspension "until my youngest *grandchild* shall become of age;" for the youngest grandchild might be one who was not in being when the testator died.

Likewise, in a state like New York, when the alienability of property is suspended, as, for example, by a trust, for the benefit of many life owners, it will be treated as practically dividing the property into as many distinct parts as there are life tenants, whenever this can be fairly done.¹ And, generally, whenever a gift that otherwise would be invalid can be sustained by treating it as two or more distinct gifts, each for not more than the prescribed number of lives, this will be done whenever such a course is fair and reasonable.² Thus, a devise in trust, "for my ten children for their lives, and as each one dies his share to be divided *per stirpes* among his issue," is ten distinct, valid trusts, each for one life.³ And a gift to testator's widow for life, and then to his two sons for life, and then to all his grandchildren, there being no provision that one son who should outlive the other should take all the property for the rest of his life, made two distinct gifts, one to the widow and one son and after the death of those two persons to the grandchildren, and the other to the widow and the other son and after the death of those two persons to the grandchildren.⁴

§ 674. **Separation of Valid Parts from those that are Invalid.** — The separation of the valid portions of a gift or grant from those that are invalid, and the consequent preservation of the former, is another illustration of the principle explained in the preceding section. The courts will not make a trust or devise for a settler, nor strain after a meaning which he does not express. And the ordinary common-law rule is often stated to be that "a gift cannot be divided when the settler or testator has not divided it."⁵ But the courts of to-day, and

¹ Corse v. Chapman, 153 N. Y. 466; Vanderpoel v. Loew, 112 N. Y. 167; Van Brunt v. Van Brunt, 111 N. Y. 178; Chaplin, Susp. Pow. Alien. §§ 176-183.

² Ibid.; Allen v. Allen, 149 N. Y. 280.

³ Corse v. Chapman, 153 N. Y. 466; Van Brunt v. Van Brunt, 111 N. Y. 178.

⁴ Haug v. Schumacher, 166 N. Y. 506.

⁵ Proctor v. Bishop of Bath, 2 H. Blackst. 358; Miles v. Harford, L. R. 12 Ch. Div. 691. In the last of these cases it is said that one possible contingency, which might save the estate, will not do so when it is coupled by implication with another expressed one which is too remote. Thus, "on a gift to A for life, with a gift over in case he shall have no son who shall attain the age of twenty-five

especially those of this country, will cut off and discard an invalid provision, in all cases where it is reasonably separable, and is not an essential feature of an entire scheme.¹ That part of an express trust, which illegally suspends the power of alienation, says the New York Court of Appeals, "is separable from the valid trusts, in a case where the trust which is defeated is independent of the other dispositions of the will and subordinate to them and is not an essential part of the general scheme."² Thus, if realty in New York be devised in trust for A for life, then for B for life, then for C for life, and then the fee simple to go to the oldest son of A who has no son at the time of the testator's death, the invalid trust for the third life (C's), being severable, is cut off and the remainder in fee takes effect after the death of A and B, if A leave a son.³ If, on the other hand, land in New York were devised in trust for A, B, and C, and the survivors and survivor as long as any of them lived, with remainder in fee to the youngest son of A, the entire scheme must fail, because there is no way of determining that any two of the three life estates are valid and the other one invalid — all are invalid together.⁴ So, wherever part of a gift is too remote, and another part is not, the latter will be allowed to stand, unless the illegality of the former is of such a nature as to taint them both.⁵ And a distinct provision of a will, such, for example, as a clause forbidding any sale of the property within the period prescribed by the rule against perpetuities, may be disregarded whenever it is reasonably separable from the other and valid provisions of the instrument.⁶

years, the gift over is void for remoteness." And it is not saved by the possibility that A *might* die without any child. But see *Evers v. Challis*, L. R. 7 H. L. Cas. 531. This is in harmony with the principle, explained in the text, that, after the work of construction is done, the contingency causing the longest suspension must govern. But, in the work of construction, this will first be separated from the others, so that it may be allowed to fail alone, when the language will fairly bear that construction. See next succeeding note: *Chaplin, Susp. Pow. Alien.* §§ 484-494; *Gray, Perpetuities*, ch. ix. See *Edgerly v. Barker*, 66 N. H. 434.

¹ *Manice v. Manice*, 43 N. Y. 303,

384; *Schermerhorn v. Cotting*, 131 N. Y. 48; *Schlereth v. Schlereth*, 173 N. Y. 444; *Chapman v. Cheney*, 191 Ill. 574; *Hills v. Simonds*, 125 Mass. 536; *Albert v. Albert*, 68 Md. 352; *Chaplin, Susp. Pow. Alien.* § 482.

² *Manice v. Manice*, 43 N. Y. 303, 384.

³ Last two preceding notes; *Greene v. Greene*, 125 N. Y. 506.

⁴ *Bindrim v. Ullrich*, 64 N. Y. App. Div. 444; *Almstaedt v. Bendick*, 47 N. Y. App. Div. 265.

⁵ Last four preceding notes.

⁶ *Haug v. Schumacher*, 166 N. Y. 506; *Roe v. Vingut*, 117 N. Y. 204; *Kennedy v. Hoy*, 105 N. Y. 134; *Chaplin, Susp. Pow. Alien.* § 482.

§ 675. **Property generally, Corporeal and Incorporeal, Real and Personal, affected by the Rule against Perpetuities.** — The principle of public policy which originated and retains the rule against perpetuities — the demand that property shall be kept in the market and shall move along the paths of commerce and enterprise — applies to substantially all kinds of property, corporeal and incorporeal, real and personal.¹ In New York, a distinction is made between the period during which the absolute ownership of personal property, except chattels real, may be suspended and that of the valid suspension of the absolute power of alienation of realty. The former is restricted to *two lives in being*; and a minority and the period of gestation of a child can not be added. (a)

(a) The New York statute has been heretofore quoted, which subjects chattels real to the same rule as to suspension as that which governs fees — “so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.” Real Prop. L. § 39; § 667, note (a), *supra*. As to all other kinds of personal property, the statutes provide that, — “The absolute ownership of personal property shall not be suspended, by any limitation or condition whatsoever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator. In other respects limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property.” N. Y. Personal Property L. (L. 1897, ch. 417) § 2. See, also, the same act, §§ 3-9; *Sawyer v. Cubby*, 146 N. Y. 192. An effect of this distinction in periods, as to personalty and realty, is that statements in a deed or will, dealing in the same manner with both realty and personalty, may be entirely valid as to the former, and wholly or partly void as to the latter. See *Manice v. Manice*, 43 N. Y. 303. It is well to note here, also, that, since personal property disposed of by will is ordinarily to be governed by the law of the testator’s domicile at the time of his death, and the New York policy is not specially concerned with gifts of such property that is to be taken elsewhere and administered, the only legacies of personalty that are governed by these statutes are those made in “domestic wills” (wills of testators who die domiciled in New York) which retain the property in New York. If the will send the property abroad, to a place where the limitation is valid though it would be too remote in New York, or bring it to New York from the testator’s domicile where the limitation is valid though longer than the New York period, it is sustained. *Dammert v. Osborn*, 140 N. Y. 30; *Hope v. Brewer*, 136 N. Y. 126; *Cross v. United States Trust Co.*, 131 N. Y. 330. See *Chaplin*, *Susp. Pow. Alien.* ch. vii.

¹ Gray, *Perpetuities*, §§ 316-321. That mere conditions and possibilities, which are generally not property but

mere chances, do not usually cause suspension is explained in § 671, *supra*.

The Rule against Accumulations.

§ 676. **The Common-Law Rule, and the Statutes.** — The rule against perpetuities is also at common law the rule which prescribes the period of valid accumulation of the income of property, i. e., the time during which the entire property may be held in trust and inalienable, and made to increase by the constant adding of the income to the principal.¹ Mr. Thellusson's will, dated 1796, which ordered an accumulation of a large amount of property for nine lives in being; while held to be valid,² gave such a glaring illustration of the possible, unreasonable multiplying of large fortunes, that the period of valid accumulations was restricted in England by the statute 39 and 40 Geo. III. ch. 98, which has accordingly come to be known as the "Thellusson Act."³ It prevents accumulation for longer than the life of the settler, or for more than twenty-one years after his death, or for longer than during the minorities of the beneficiaries or of named persons in being at the death of the settler.⁴ It applies to both realty and personalty. Its most important constructions have been that, under its peculiar wording, no *minorities* can measure the accumulation except those of persons in being at the death of the settler⁵ (though it may continue for an absolute period of twenty-one years); and that, if the accumulation be ordered to continue longer than the act permits, it will be good for the statutory period, provided it is not so long as also to violate the common-law rule against perpetuities.⁶

In this country, wherever statutes have dealt with the matter, they are in the main like that of New York, which is briefly explained in the following section. Pennsylvania, possibly followed by one or two other states, has a statute substantially the same as the Thellusson Act.⁷ In the other states, where no special statutes exist and which probably constitute

¹ Griffiths v. Vere, 9 Ves. 127, note; Pray v. Hegeman, 92 N. Y. 508, 514; Gray, Perpetuities, § 671.

² Thellusson v. Woodford, 4 Ves. 227, 11 Ves. 112.

³ See Vail v. Vail, 4 Paige (N. Y.), 317, 323; Hargrave's Treatise on the Thellusson Act.

⁴ Gray, Perpetuities, §§ 686-699.

⁵ Ellis v. Maxwell, 3 Beav. 587; Haley v. Bannister, 4 Madd. 275. But

see Hargrave's Treatise on Thellusson Act, § 95; Marsden, Perpetuities, p. 337.

⁶ Weatherall v. Thornburgh, L. R. 8 Ch. Div. 261; Griffiths v. Vere, 9 Ves. 127; Hargrave's Treatise, Thel. Act, § 111.

⁷ 2 Pepper & Lewis' Pa. Digest, p. 4055, being act of Apr. 18, 1853, § 9; 1 Stim. Amer. Stat. L. § 1443.

the majority, the simple rule is that accumulations can not be legally made so as to violate the rule against perpetuities. And it is held in such jurisdictions that, when the estate is *vested* in the beneficiaries they have the power to terminate an accumulation at any time; and therefore a direction to trustees to accumulate, in such instances, causes no suspension at all.¹ And it is also settled in such states that a direction to accumulate for creditors of the settler causes no suspension, because they may take the property at any time and thus terminate all accumulations.²

§ 677. **Accumulation only during a Minority in Several States.**—In a number of the United States, of which New York, Michigan, and Wisconsin are illustrations, accumulations are so regulated by statute that they must begin within the period allowed for the vesting of future estates (in such jurisdictions two lives in being) and during the minority of the beneficiaries, and can not continue longer than such minority.³ Based on the New York statute and its construction, the following are the four leading principles which govern accumulations of the income of either realty or personalty or both in such states.

Beginning. The accumulation may begin at once on the creation of the estate, if the beneficiary be then born; or within or at the end of two lives in being at the creation of the estate when it is in realty, or *within* the two lives in being when it is personalty, and during the minority of the beneficiary.⁴ It can not begin before the birth of the beneficiary. But he need not be in being when the estate is created. Thus, a trust of real property is valid, to pay the income to A (in being)

¹ *Oddie v. Brown*, 4 De G. & J. 179; *Wharton v. Masterman* (1895), App. Cas. 186; *Gray, Perpetuities*, §§ 671-673.

² *Tewart v. Lawson*, L. R. 18 Eq. 490; *Morgan v. Morgan*, 20 R. I. 600; *Gray, Perpetuities*, § 676.

³ N. Y. L. 1896, ch. 547, § 51; 1 Stim. Amer. Stat. L. § 1443; *Chaplin, Susp. Pow. Alien*, p. 150, note 2.

⁴ *Ibid.* "In the case of real property, when the two lives have ended, there is, in certain cases, opportunity for a further suspension during a minority. Here the accumulation may begin at the end of the two lives, and

extend on through the minority. But in the case of personal property, when the end of the two lives has been reached, there is no further opportunity for suspension, and consequently none for accumulation. It necessarily follows, therefore, that a trust for accumulation, in order to secure any leeway to effect its purpose, must begin within the term of suspension, and then can run only until either the majority or earlier death of the infant, or the sooner termination of the two lives is reached." *Chaplin, Susp. Pow. Alien*, § 432, citing *Manice v. Manice*, 43 N. Y. 303, 381 *et seq.*

while he lives, and then to B (in being) while he lives, and if at B's death he leave a minor son then to accumulate the income during that son's minority and for his benefit.¹

Beneficiaries. The accumulation must be solely for the benefit of the minor by all or a part of whose minority it is measured. It can not be made during the minority of A for the benefit of B, or of A and B jointly. Nor is a direction valid by which an accumulation is to be made during A's minority for the purpose of having the income of the accumulated fund then paid to A for life, and at his death the fund to go to B.² Neither is it good for the purpose of paying off a mortgage or other charge on the property.³ But it may be ordered for a number of successive minorities, for the benefit of each minor respectively, so long as the ultimate period is kept within the time prescribed by the rule against perpetuities.⁴ And, because of the practical necessity of the case, it seems to be allowable to provide for an accumulation during A's minority for his benefit, with a contingent gift of the accumulations to B at the time of A's death, if A die before reaching his majority.⁵

Termination. The accumulation must terminate at or before the majority of the beneficiary.⁶ It may be made to end before he is twenty-one; and his death terminates it if he die before reaching that age. Not being capable of beginning until he is born, and necessarily ending at or before he is twenty-one, the accumulation must be limited by a minority or a portion of a minority.

Excess void. If an accumulation be ordered "for a longer term than during the minority of the beneficiaries, it shall be void only as to the time beyond such minority."⁷ For example, a direction to accumulate for the benefit of A, a minor, until he is twenty-five years old, is valid for the period until he shall be twenty-one; and at his majority he will be entitled

¹ *Gott v. Cook*, 7 Paige (N. Y.), 521; *Kilpatrick v. Johnson*, 15 N. Y. 322; *Manice v. Manice*, 43 N. Y. 303.

² *Pray v. Hegeman*, 92 N. Y. 508; *Barbour v. De Forest*, 95 N. Y. 13. See *Wilson v. Odell*, 58 Mich. 533.

³ *Hascall v. King*, 162 N. Y. 134; *Hafner v. Hafner*, 62 N. Y. App. Div. 316, aff'd, 171 N. Y. 633.

⁴ *Mason v. Mason's Ex'rs*, 2 Sand.

Ch. (N. Y.) 432; *Chaplin, Susp. Pow. Alien*, § 261.

⁵ *Smith v. Parsons*, 146 N. Y. 116, 120. See *Chaplin, Susp. Pow. Alien*, §§ 263-272.

⁶ The statutes so declare. See *Hull v. Hull*, 24 N. Y. 247; *Goebel v. Wolf*, 113 N. Y. 405, 413.

⁷ N. Y. L. 1896, ch. 547, § 51, subd. 3.

to the income accumulated up to that time.¹ In such cases, where the period fixed by the settler is excessive and he directs that the fund shall not be paid to the beneficiary till the end of that period, and the general scheme is not entire and inseparable, the courts carry out his intent as far as it is legal, by giving the accumulated income to the beneficiary when he is of age, then having him receive regularly the subsequent income on the *corpus* till the end of the period named (assuming of course that such period is permitted by the rule against perpetuities) and ultimately giving him the *corpus* at the end of the entire period. Thus, a trust to accumulate till A is forty years of age and then to pay him the principal and income, will be carried out by giving him the accumulated income when he is of age, then paying him the income regularly as it accrues until he is forty, and then handing over to him the principal.² But, of course, when the scheme of the gift is one and inseparable, and part is illegal, the whole must fail. The above-quoted statute means that the excessive period shall be void, and the other stand, whenever a separation of the two is reasonably possible.³ (a)

(a) The New York statute restricts accumulations of the income of real property as follows: "All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, shall be void. An accumulation of rents and profits of real property, for the benefit of one or more persons, may be directed by any will or deed sufficient to pass real property as follows: 1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority. 2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the beneficiaries, and shall terminate at or before the expiration of such minority. 3. If in either case such direction be for a longer term than during the minority of the beneficiaries, it shall be void only as to the time beyond such minority." Real Prop. L. § 51, originally 1 R. S. 726, §§ 37, 38. And the similar provisions as to personal property are found in the Personal Property Law (L. 1897, ch. 417), § 4. In addition to the explanations, in the text of this section, of the meaning and operation of these statutes, it is to be reiterated that these rules form *the guide and criteria* as to accumulations in

¹ Pray v. Hegeman, 92 N. Y. 508; Radley v. Kuhn, 97 N. Y. 26; Cochrane v. Schell, 140 N. Y. 516, 536.

² Ibid.; Chaplin, Susp. Pow. Alien. §§ 262-276.

³ Cook v. Lowry, 95 N. Y. 103; Hascall v. King, 162 N. Y. 134.

New York; and that income can not be indirectly accumulated for any longer time by means of the second (2) form of the active express trusts—a trust to lease realty “for the purpose of satisfying any charge thereon.” It seems clear that a lease made under this trust must be for a gross sum payable at once; and it can not be for payments for rent to accrue from time to time, and by thus gradually discharging a lien increase the value of the property for its owner by what would be in effect an accumulation not measured by a minority. Thus, if one who owns land worth \$100,000, subject to a mortgage for \$60,000, should devise it to trustees to lease it and apply the net rents from time to time to the payment of the interest and then the principal of the mortgage debt till it was all discharged, and then to divide the \$100,000 worth of property thus acquired among designated beneficiaries, this attempted indirect accumulation would be void. *Hascall v. King*, 162 N. Y. 134; *Hafner v. Hafner*, 62 App. Div. 316, *aff'd*, 171 N. Y. 633.

It sometimes occurs that a valid direction to accumulate is made for the benefit of an infant, who is destitute of other sufficient means of support and education, and who should not be deprived of the benefit of the entire income until his majority. The following section of the Real Property law provides for such cases: “Where such rents and profits are directed to be accumulated for the benefit of a minor entitled to the expectant estate, and such minor is destitute of other sufficient means of support and education, the supreme court, at a special term, or, if such accumulation has been directed by will, the surrogate’s court of the county in which such will has been admitted to probate, may, on the application of his general or testamentary guardian, direct a suitable sum out of such rents and profits to be applied to his maintenance or education.” § 52, originally 1 R. S. 726, § 39. And the similar statute as to personality, which however omits the requirement that the infant shall be “entitled to the expectant estate,” is found in Pers. Prop. L. § 5. See *Matter of Davidson*, 6 Paige, 136. When the terms of the gift are such as to *vest* the ownership of the accumulations in the infant as they accrue, in such case, if he die before the time of payment to him arrives, they belong to his estate, and pass to his personal representatives and not over to others. *Smith v. Parsons*, 146 N. Y. 116.

It sometimes occurs, also, that the direction for accumulations is void, but all the other provisions of the trust are valid. Such a case arises, for example, when the trustee of an otherwise valid trust is ordered to lease land and apply the net yearly rents to the discharge of a mortgage upon it. In such cases, there may be a legal suspension of the absolute power of alienation for a time during which there is no valid disposition of the income. And all of these are regulated by § 53 of the Real Property Law (originally 1 R. S. 726, § 40), which declares that: “When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.” Thus, a trust during the life of A, to pay him one-half of the net income, and accumulate the other half; and at A’s death to divide the principal and accumulations among his then living children, is valid in all respects save as to the direc-

tion for accumulation. And the half of the income not payable to A would belong to his children in being as it accrued from time to time. This statute changes the common law in this regard, which gave such undisposed of income to the settler or donor or his heirs. *Hascall v. King*, 162 N. Y. 134, 153; *Schermerhorn v. Cotting*, 131 N. Y. 48, 61; *Delafield v. Shipman*, 103 N. Y. 463, 469; *Manice v. Manice*, 43 N. Y. 303, 384; *Gilman v. Reddington*, 24 N. Y. 9; *Williams v. Williams*, 8 N. Y. 525, 538; *Gott v. Cook*, 7 Paige, 521, 542; *Chaplin, Susp. Pow. Alien*, § 275; *Cornish, Uses*, p. 68 *et seq.*

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